

***United States Court of Appeals
for the Second Circuit***



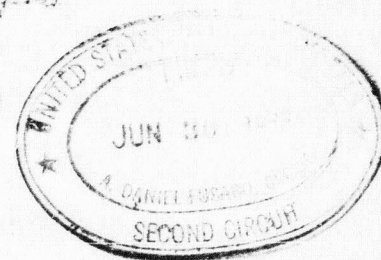
**APPELLANT'S
APPENDIX**

77-1157

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
:
UNITED STATES OF AMERICA, :
:
Plaintiff-Appellee, :
:
-against- :
:
JAMES R. LORD, JR., :
GERALD J. YAGY, and :
GERHARDT J. SCHWARTZ, :
:
Defendants-Appellants. :
:
-----X

B
PPS
Docket No. 77-1157



JOINT APPENDIX TO APPELLANTS' BRIEFS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALFRED P. KREMER, ESQ.,
Attorney for Appellant
JAMES R. LORD, JR.
200 Times Square Building
Rochester, New York 14614
(716) 546-6040

ROY E. COLICCHIO, ESQ.,
Attorney for Appellant
GERALD J. YAGY
44 Exchange Street
Rochester, New York 14614
(716) 325-5494

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
GERHARDT J. SCHWARTZ
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

BARRY BASSIS, Of Counsel.

PAGINATION AS IN ORIGINAL COPY

U.S. TITLE/SECTION
18-2113(a)
18-2113(d)
18-371

OFFENSES CHARGED
Bank Robbery by force (Ct.1)
Armed bank robbery (Ct. 2)
Conspiracy to commit bank robbery by Force (Ct.3)

ORIGINAL COUNTS
1
1
1

U.S. MAG. CASE NO.

BAIL - RELEASE
AMT
Set
\$ 000
Date
Conditions
10% Deposit
Surety Bond
Collateral
3rd Prty Cust
Other

II. KEY DATES & INTERVALS

ARREST or
U.S. Custody Began
11/22/76
Summons Served
First Appearance
12/16/76

INDICTMENT
Information
7/29/76
Indict. Waived
Superseding
Indict/Info

ARRAIGNMENT
11/30/76
1st Plea
Final Plea

TRIAL
Trial Set For
2/8/77
Trial Began
2/9/77
Trial Ended
2/12/77

SENTENCE
Disposition of Charges
2/12/77
3/18/77
Convicted
Acquitted
Dismissed
On All Charges
On Lesser Offense(s)
WOP
WP
On Govern's Motion

MAGISTRATE

Search Warrant
Summons
Arrest Warrant Issued
COMPLAINT
OFFENSE (In Complaint)

DATE
INITIAL/NO.
PRELIMINARY EXAMINATION OR REMOVAL HEARING
WAIVED
NOT WAIVED
INTERVENING INDICTMENT

INITIAL APPEARANCE DATE
Date Scheduled
Date Held
Type Number

OUTCOME
DISMISSED
HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.
Gerald Houlihan
U.S. Courthouse, Rochester,
New York - 473-6760

ATTORNEYS
Defense
Anthony Amoroso
Merwin Morehouse
450 Reynolds Arcade Building
Rochester, N.Y.

* Show last names and suffix numbers of other defendants on same indictment/information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
7/29/76		Filed Indictment	
7/30/76		Filed cy. of arrest warrant issued by U.S. Atty. Rochester - 7/29/76	
8/4/76		Filed Magistrate's warrant of arrest, executed ret. unexecuted, Magistrate's complaint, with affidavit	
11/1/76		Filed order reassigning case from Judge Burke's calender to Judge Elfvin's calender. BURKE, J.	
12/9/76		Filed Magistrate papers from the U.S. Dist. Ct., for the Souther Dist. of N.Y., - Waiver of removal Hearing, Final Commitment, and Warrant of Arrest, issued from the W.D.N.Y., executed 11/22/76 in the Southern Dist. of N.Y.	
12/16/76		Deft. in custody is present; Court sets bail at \$50,000 cash bail. Court will appoint Anthony J. Amoroso as Atty. ro represent deft.	

DATE	DOCUMENT NO.	INTERVIEW SECTION (a)	FILED BY AND DATE (b)	LV. CODE (c)
Dec. 21				
	Filed copy 5 CJA 20 order appointing counsel. Copy 4 To Adm. Office, remaining copies to Atty. for submission of voucher. ELFVIN, J.			
Dec. 27				
	Filed copy 5 CJA 20 order appointing counsel. Copy 4 to Adm. office, remaining copies to Atty. for submission of voucher. ELFVIN, J. Replacing Anthony Amoroso.			
1/25/77		3	1/25	
	Co.-Deft. Yagy moved for a continuance; the Court granted a continuance under the provisions of Title 18, Section 3161(h)(7) 2/8/77; the court further noted that each deft. would have five peremptory challenges.			
2/8/77			2/8/77	R
	Govt. moves case to trial before Judge Elfvin, at Rochester, N.Y. - Jurors sworn, Trial adj. 2/9/77. Court denied motions for severance and mistrial by deft. Hearing - Court heard testimony on motion to suppress statements by deft. Schwartz. Court reserved Decision.			
2/9/77				
2/9/77	Court reviews with Attys. records to be furnished by Dist. Atty., Monroe Co., etc. Court rules on admissibility of evidence, subpoenas issuing by defts. for records of various Police agencies. Jury enters - Witnesses testify. (Out of presence of Jury, Court holds hearing and witnesses are called. Trial resumes with jury present. Trial adj. 2/10/77.			
2/10/77				
	Trial resumes. Trial Adj. 2/11/77--			
2/11/77				
	Trial continues with same appearance - Court denies motion to dismiss. Trial adj. 2/12/77.			
2/12/77				
	Court denies motion for mistrial by deft., then rules on request to charge. Jury Enters. Jury leaves to begin deliberation. Jury enters and reports verdict as follows: Deft. guilty on all three counts. Jury is polled and discharged. Court will set date for sentencing later.			
3/18/77				
	The Court sentenced deft. as follows: On Counts One & Two the Court sentenced defendant to the custody of the Atty. General for a period of Twenty-Five Years (25); on count three the court sentenced the deft. to the custody of the Atty. General for a period of Five (5) Years, to be served consecutively to sentences imposed under Counts One & Two. ELFVIN, J.; The Court allowed Atty. Morehouse to withdraw as appointed Atty., and the Court directed Clerk to file a Notice of Appeal.			

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3/25/77	(Document No.) Filed Judgment and commitment. Commitment issued.				
3/25/77	Filed deft's notice of appeal				
3/25/77	Copy of notice of appeal, financial affidavit, form A and copy of docket entries mailed to CCA.				
3/29/77	Filed copy 5 CJA 21 authorization for Ct. Steno, copy 4 to Adm. Office. ELFVIN, J.				
4/22/77	Filed three volumes of trial transcript.				
4/25/77	Filed four volumes of trial transcript.				
4/27/77	Filed two volumes of transcript of pretrial motions taken before Judge Elfvin on 10-25-76 and 1-25-77.				
4/27/77	Filed cert. copy of J&C Order showing defendant delivered on 4/20/77 to U.S. Penitentiary at Atlanta, Ga.				

Mo. ☐ 209 1 0902	vs. LORD, JAMES R. JR.	Mo. Day 7 29 76	76-131 01
Dis. ☐ District Office 0906	(LAST, FIRST, MIDDLE)	No. of Def's * 3	Yr. Docket No. Def.
U.S. TITLE/SECTION		U.S. MAG. CASE NO.	

OFFENSES CHARGED
18-2113(a) Bank Robbery by Force(Ct.1)
18-2113(d) Armed Bank Robbery (Ct.2)
18-371 Conspiracy to commit bank robbery by force (Ct.3)

ORIGINAL COUNTS

1
1
1

BAIL - RELEASE
☐ AMT ☐ Fugitive
☐ Denied ☐ Set ☐ Pers. Recog.
☐ PSA
\$ 25 000 conditions
Date 7/30/76
☒ Bail Not Made
☐ Status Changed (See Docket)
☐ 10% Deposit
☒ Surety Bond
☐ Collateral
☐ 3rd Prty Cust
☐ Other

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began 7/30/76 Summons Served First Appearance	INDICTMENT ☒ High Risk Date 7/29/76 Indict. Waived ☐ Superseding ☐ Indict/Info ☐ In Charging District	ARRAIGNMENT 7/30/76 1st Plea 7/30/76 Final Plea	TRIAL Trial Set For Voor Dire 2/8/77 Trial Began 2/9/77 Trial Ended 2/12/77	SENTENCE Disposition of Charge 2/12/77 3/22/77 ☒ Convicted ☐ Acquired ☐ Dismissed ☐ On All Charges ☐ On Lesser * Offense(s) ☐ WOP: ☐ WP ☐ On Governm'ts Motion
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MAGISTRATE

Search Warrant Issued Summons Issued Arrest Warrant Issued COMPLAINT OFFENSE (In Complaint)	DATE INITIAL/NO.	INITIAL APPEARANCE DATE PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT	INITIAL/NO. Tape Number	OUTCOME: ☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW:
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U.S. Attorney or Asst.

ATTORNEYS

Defense ☒ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Gerald Houlihan
U.S. Courthouse
Rochester, New York 14614

Alfred P. Kremer, Esq.
200 Times Square Building
Rochester, N.Y. 14614 (546-6040)

473-6760

* Show last names and suffix numbers of other defendants on same indictment/information:

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
7/29/76		Filed Indictment	
7/30/76		Deft. being duly arraigned enters a plea of not guilty.	
7/30/76		Filed Pet. and Order for a Writ of H.C. Ad Prosequendum for arraignment ret. 7/30/76-Roch. Burke, J.	
8/4/76		Filed Magistrate's Complaint with affidavit	
8/4/76		Filed Writ of H.C. Ad Proseq., executed 7/30/76	
9/3/76		Filed Magistrate's warrant of arrest - executed 7/30/76	
9/13/76		Motion by Deft., Lord, for discovery and inspection, etc. Adj. until 9-27-76.	
9/13/76		Filed Deft Lord's affidavit & notice of motion for discovery and inspection, etc. - ret. at Roch. 9/13/76	

DATE

IV. PROCEEDINGS (continued)

PAGE TWO

V. EXCLUDABLE DELAY

(DOCUMENT NO.)

Interval
Section
(a)Start Date
End Date
(b)Lir
Code
(c)

10/1/76	Filed Govt's Notice of Readiness		
10/4/76	Filed Govt's Notice of motion and motion for an order assigning a Judge to assume responsibility in this case so that it may be tried within the time period prescribed by the Speedy Trial Act. (18 U.S.C., Sect. 3161, et seq.); This motion is submitted to the Court for decision without oral argument.		
10/22/76	Filed Pet. & Ord. for Writ of H.C. Ad Proseq., for jury selection 10/25/76-Roch.-CURTIN, J.		
10/25/76	Judge Elfvin advised Deft. Lord that Attys. Hoffenberg & Crimi have withdrawn from the case. The Court is considering appointment of counsel based on financial affidavit. Court directs that deft. Lord be held in Federal custody, and advised deft. that court will consider bail motion at anytime.		
11/1/76	Filed order reassigning case from Judge Burke's calender to Judge Elfvin's calender BURKE, J.		
11/15/76	Filed Ct. steno's minutes of the proceedings of 10/25/76		
11/15/76	Filed copy 5 CJA 20 appointment of counsel. Copy 4 to Adm. Office. Remaining copies to Atty. for submission of voucher. ELFVIN, J.		
12/8/76	Filed deft Lord's motion for severance, ret. 12-13-76 at 10:00, Rochester.		
12/13/76	Defendant Kremer furnished a memorandum to the Court. The Court granted oral motion by AUSA Gerald J. Houlihan to reduce bail from \$25,000 cash to \$25,000 personal recognizance bond, to permit defendant Lord to be in custody of State Police conducting investigation outside the State, and to set on the Record a Waiver of Defendant's rights re return to State custody for this purpose.	3	12/13/76 E 12/13/76

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE 1976.	PROCEEDINGS	CLERK'S FEES			
		PLAINTIFF		DEFENDANT	
Dec. 15	Filed \$25,000 Personal Recognizance Bond for deft.				
Dec. 15	Filed deft's acknowledgement and waiver re the Interstate Agreement on Detainers				
Dec. 15	Filed \$25,000 personal recognizance bond				
Dec. 20	Filed Government's response to defendant's motion				
1977					
Jan. 21	Filed Writ of Habeas Corpus Ad Proseq. for Deft. for trial, executed 12/14/76				
Jan. 25	Court denied motion for severance by Deft. ; Co-deft. Yagy moved for a continuance, the court granted a continuance under the provisions of Title 18, Sect. 3161(h)(7) to 2/8/77				3 1/25/77
Jan. 26	Filed Petition and Order for A Writ of Habeas Corpus Ad Prosequendum for Deft. for trial, ret. 1/25/77-Roch. (Deft. in custody of the Monroe County Sheriff, Monroe County Jail, Rochester, N.Y., confined in that institution on state charges)				
Feb. 9	Filed four subpoenas DT - William Lombard, Park Ridge Hospital, Roandl Seward, Thomas Hastings - served 2/4/77				3 2/21
Feb. 8	Govt. moves case to trial before Judge Elfvin, at Rochester, N.Y. - Jurors sworn - Trial adj. to 2/9/77; Court denied motions for severance and mistrial by deft.				
Feb. 9	Court rules on admissibility of evidence, subpoenas issuing by defts. for records of various Police Agencies. Jury enters - Witnesses testify. (Out of presence of Jury Court holds hearing and witnesses are called. Trial resumes with jury present. Trial adj. to 2/10/77				
Feb. 9	Court review with Attys. records to be furnished by Dist. Atty. of Monroe etc.				
Feb. 10	Trial resumes. Trial adj. to 2/11/77--				
Feb. 11	Trial continues with same appearance - Court denies motion to dismiss. Trial adj. 2/12/77				
Feb. 12	Court denies motion for mistrial by deft., then rules on request to charge. Jury Enters. Jury leaves to begin deliberation. Jury enters and reports verdict as follows: Deft. guilty on all three counts. Jury is polled and discharged. Court will set date for sentencing later. XXXXXXXXXXXX				
March 22	Court sentenced defendant under Count Three to the custody of the Attorney General for a period of Five (5) Years. On Counts One and Two to the custody of the Attorney General for a period of Twenty years, sentences to be served consecutively. ELFVIN, J.				
March 22	Filed Deft's notice of appeal				
March 24	Cy. of notice of appeal, mailed to U.S. Atty., defendant, and to the CCA with form A, CJA-23, and statement of docket entries.				
March 24	Filed copy 5 CJA 21 authorization for Ct. Steno, copy 4 to Adm. Office. ELFVIN, J.				

MO ☐ MD ☐ MS ☐ Fel ☒	0902 Disp / Sentence	vs. YAGY, Gerald J. (LAST, FIRST, MIDDLE)	Case filed Mo. Day 7 29	No. of Def's * 3	Yr. 76 Docket No. 76-131 Del. H 3
U.S. TITLE / SECTION 18-2113(a) 18-2113(d) 18-371		OFFENSES CHARGED Bank Robbery by force (Ct.1) Armed Bank Robbery (Ct.2) <i>dismissed</i> Conspiracy to commit bank robbery by Force (Ct. 3)		ORIGINAL COUNTS 1 1 1	
<i>Ct 2 dismissed</i> <i>pending trial</i>					
II. KEY DATES & INTERVALS					
ARREST or U.S. Custody Began 7/26/76 Summons Served 7/26/76 First Appearance 7/26/76		INDICTMENT ☒ Information ☐ High Risk Date 7/29/76 Indict. Waived ☐ In Charging District ☐		ARRAIGNMENT ☒ Trial Set For 7/30/76 1st Plea same Final Plea ☐	
		SUPERSEDING COUNTS ☐		TRIAL ☒ Voir Dire ☒ 2/8/77 Trial Began ☒ 2/9/77 Trial Ended ☒ 2/12/77	
				SENTENCE ☒ Disposition of Charges 2/12/77 3/22/77 ☒ Convicted ☐ Acquitted ☐ Dismissed ☐ On Government's Motion	
MAGISTRATE					
Search Warrant Issued Return Summons Issued Served Arrest Warrant Issued COMPLAINT ☒ OFFENSE (in Complaint)		DATE INITIAL/NO. INITIAL APPEARANCE DATE PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT		INITIAL/NO. OUTCOME: ☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW:	
U.S. Attorney or Asst. Gerald Houlihan U.S. Courthouse, Rochester, N.Y. 473-6760		ATTORNEYS Defense: ☐ CJA ☒ Ret ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD XXXXX Roy E. Colicchio 44 Exchange Street Rochester, N.Y. 14614 (716) 325-5494			
* Show last names and suffix numbers of other defendants on same indictment/information:					
(1) LORD (2) SCHWARTZ					
DATE 7/29/76 7/30/76 8/4/76 9/8/76 9/13/76 10/1/76 10/4/76		PROCEEDINGS Filed Indictment Deft. being duly arraigned enters a plea of Not Guilty. Filed Magistrate's complaint, with affidavit, and \$1,000 unsecured bond, executed 7/26/76 Filed Deft's notice of motion for discovery & inspection, disclosure of Brady material bill of particulars and etc., ret. 9/13/76-Roch. Motion by Deft., Yagy, for discovery and inspection, etc. Adj. until 9-27-76. Filed Govt's Notice of Readiness Filed Govt's Notice of motion and motion for an Order assigning a Judge to assume responsibility			

(DOCUMENT NO.)

Interview
Section II
(a)Start Date
End Date
(b)Ltr.
Code
(c)

10/4/76

in this case so that it may be tried within time period prescribed by the Speedy Trial Act. (18 U.S.C., Sect. 3161, et seq.); This motion is submitted to the Court for decision without oral argument.

10/14/76

Filed affidavit of Atty. Roy E. Colicchio, Esq., counsel for deft., made in response to the motion brought on by the Govt. requesting the assignment of one or more judges to assume responsibility for the disposition of certain criminal cases assigned to the Rochester Calendar. Defendant Yagy has been admitted to the Veterans Hospital, for surgery to take place on 10/8/76, and will be recuperating for a period of at least four (4) weeks. A medical report will be furnished to the U.S. Atty.'s office. Deft. is not ready for trial because of medical condition.

3

10/7/76 N
11/3/76

10/25/76

Atty. Collechio argues motions for discovery and to dismiss before Judge Elfvin. Court directs Govt. to furnish discovery. Reserved decision on motion to dismiss. Expiration 30 days

3

10/25/76 G
11/23/76

11/1/76

Filed order reassigning case from Judge Burke's calender to Judge Elfvin's calender. BURKE, J.

11/15/76

Filed Ct. steno's minutes of 10/25/76

1/25/77

Deft moved for a continuance, the court granted a continuance under the provisions of Title 18, Sect. 3161(h)(7) to 2/8/77; The Court further noted that each deft. would have five peremptory challenges.

3

1/25/77 T

1/25/77

Filed deft's notice of motion for trial severance, etc., ret. 2/14/77-Roch. (Court's endorsement on motion papers - Oral argument had in Rochester 1/25/77 and motions were denied on the record. Elfvin, J.) (Cy. with endorsement returned to Mr. Colicchio, for his information)

2/7/77

Filed affidavit by AUSA Gerald Houlihan, re a material witness warrant for witness David Yagy of Gerald Yagy

2/8/77

Filed Affidavit/ - dated 2/8/77

2/8/77

Govt. moves case to trial before Judge Elfvin, at Rochester, N.Y. Jurors sworn - Trial adj. 2/9/77; Court denied motions for severance and mistrial by deft.

3

2/8/77 T

2/9/77

Court rules on admissibility of evidence, sub-

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT

CRIMINAL DOCKET

U. S. vs

YAGY, Gerald J.

76

131

3

Yr.

Docket No.

Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
	(Document No.)				
2/9/77	poenas issuing by defts. for records of various Police agencies. Jury enters - Witnesses testify. (Out of presence of Jury, Court holds hearing and witnesses are called. Trial resumes with Jury present. Trial adj. 2/10/77				
2/9/77	Court reviews with Attys. records to be furnished by Dist. Atty. of Monroe Co., etc.				
2/10/77	Trial resumes. Trial adj. 2/11/77--				
2/11/77	Trial continues with same appearance. Court grants motion by deft. to dismiss Count Two. Trial adj. 2/12/77.				
2/12/77	Court denies motion for mistrial by deft., then rules on request to charge. Jury enters. Jury leaves to begin deliberation. Jury enters and reports verdict as follows: Deft. guilty on counts one and three (Ct. two having been dismissed earlier). Jury is polled and discharged. Court will set date for sentencing later. Court sets bail for deft. Yagy as \$20,000 cash or property or surety bond and remands deft. to custody.				
2/15/77	Filed \$20,000 surety bond (property) Amelia Reynolds surety				
2/15/77	notice of Filed Deft's/motion setting aside the verdict, etc				
2/18/77	Defendant argued motion for defendant against the verdict of the jury and for a judgment of acquittal. Court reserved decision, and adj. sentencing if any to 3/22/77. Elfvin, J. Court granted motion by Govt. to dismiss the warrant for the arrest of David Yagy.				
3/22/77	Court denies motion by defendant against the verdict. Court sentenced the defendant on Count Three to the custody of the Atty. General for a period of TEN (10) YEARS Five (5) Years; on Count One the Court sentenced defendant to the custody of the Atty. General for a period of Ten (10) Years, to be served consecutively to the sentence under count three. ELFVIN, J.; Court continued bail at \$20,000 and new bond to be posted by surety. Court will entertain written motion by Deft. to appeal as a poor person.				
3/22/77	Filed Deft's motion for leave to appeal in forma pauperis and for other relief				
	(over)				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

15

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE	
		(a)	(b)
3/22/77	Order granting leave to prosecute appeal in forma pauperis-Elfvin, J.		
3/22/77	Filed Deft's Notice of appeal		
3/22/77	Filed affidavit in support of release from custody pending appeal (with the Court's endorsement that defendant may be released on bail of \$20,000 and execution of sentence is stayed pending appeal--Elfvin, J.)		
3/22/77	Filed \$20,000 surety bond on appeal		
3/24/77	Cy. of Notice of appeal mailed to U.S. Atty., deft., and the CCA with statement of docket entries, form A, Cja-33, cy. of motion and Order for leave to appeal in forma pauperis		
3/25/77	Filed Judgment and commitment. Commitment issued.		
3/24/77	Filed copy 5 CJA 21 for Ct. Steno, copy 4 to Adm. Office. ELFVIN, J.		
4/22/77	Filed three volumes of trial transcript.		
4/25/77	Filed four volumes of trial transcript.		
4/27/77	Filed two volumes of transcript of pretrial motions taken before Judge Elfvin on 10-25-76 and 1-25-77.		

In the District Court of the United States

For the Western District of New York

Handed up
12:30 PM
7-29-76

THE UNITED STATES OF AMERICA

-vs-

JAMES R. LORD, JR.
GERHARDT J. SCHWARTZ
GERALD J. YAGY

May 1976

Session

Term

No. Cr: 76-131

C R - 76
Via T. 18, U.S. 1, 3 T
§§ 2113(a), 2113(d)
and 371



COUNT I

The Grand Jury charges:

On or about April 9, 1976 in the Western District of New York JAMES R. LORD, JR., GERHARDT J. SCHWARTZ, and GERALD J. YAGY did enter the Columbia Banking Savings and Loan Association, Rochester New York, the deposits of which were then insured by the Federal Deposit Savings and Loan Insurance Corporation, with intent to commit in such bank a felony affecting such bank, that is, the taking by force and violence and by intimidation and from the presence of employees of such bank, money belonging to and in the care, custody, control and management and possession of the bank, all in violation of Title 18, United States Code, Section 2113(a).

COUNT II

The Grand Jury further charges:

On or about April 9, 1976 in the Western District of New York, JAMES R. LORD, JR., GERHARDT J. SCHWARTZ and GERALD J. YAGY, by force and violence and by intimidation, did take from the person and presence of an employee of the Columbia Banking Savings and Loan Association, Rochester, New York, approximately \$43,365.00 in money belonging to and in the care, custody, control, management and possession of the Columbia Banking Savings and Loan Association



Rochester, New York, the deposits of which were then insured by the Federal Deposit Savings and Loan Insurance Corporation, and JAMES R. LORD, JR., GERHARDT J. SCHWARTZ and GERALD J. YAGY in committing the aforesaid offense did assault Joan Bauer, Betsy S. Meisch, Sandra Power and other Columbia Banking Savings and Loan Association, Rochester, New York employees and did put in jeopardy the life of these employees by means and use of dangerous weapons, all in violation of Title 18, United States Code, Section ~~2113(b)~~ 2113(d)

John T. Sullivan
U.S.D.C.
2/12/77

COUNT III

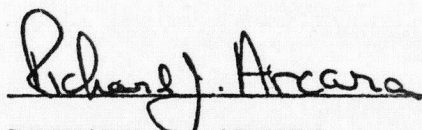
The Grand Jury further charges:

From on or about April 9, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the Western District of New York and elsewhere, JAMES R. LORD, JR. GERHARDT J. SCHWARTZ and GERALD J. YAGY, the defendants, wilfully and knowingly did combine, conspire, confederate and agree with each other and with Ronald Hook, named herein as a co-conspirator, but not as a defendant, and with diverse other persons to the Grand Jury unknown to commit the following offense against the United States, to wit: a violation of Title 18, United States Code, Section 2113, to wilfully and knowingly enter the Columbia Banking Savings and Loan Association, Rochester, New York, and by force and violence and by intimidation take from employees of that bank the deposits of which were then insured by the Federal Deposit Savings and Loan Insurance Corporation, a sum of money belonging to and in the care, custody, control, management and possession of that bank. All in violation of Title 18, United States Code, Section 371.

OVERT ACT

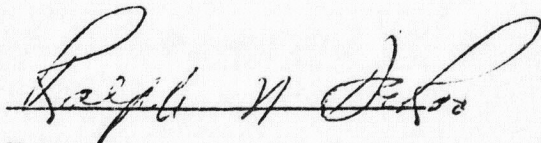
In furtherence of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts:

1. On or about April 9, 1976, JAMES R. LORD, JR., and GERHARDT J. SCHWARTZ met with Ronald Hook and drove a 1962 Buick to the Columbia Banking Savings and Loan Association, Rochester, New York.
2. On or about April 9, 1976, GERHARDT J. SCHWARTZ and JAMES R. LORD, JR. entered the Columbia Banking Savings and Loan Association, Rochester, New York.
3. On or about April 9, 1976, certain money taken from the Columbia Banking Savings and Loan Association, Rochester, New York was placed in a 1975 blue Chevrolet Nova.
4. On or about April 9, 1976, GERHARDT J. SCHWARTZ, JAMES RUSSELL LORD, JR., RONALD HOOK and GERALD J. YAGY met with each other at 65 Britton Road, Rochester, New York.



RICHARD J. ARCARA
United States Attorney

A TRUE BILL:



Foreman

1 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:10 P.M.

2
3 (Defendants present, counsel present, jury
4 present.)

5
6 CHARGE OF THE COURT

7 THE COURT:

8 Now, ladies and gentlemen, first of all,
9 Mr. Houlihan had requested an opportunity to
10 make what we call a little rebuttal argument,
11 and I denied him that right, it is sort of a
12 discretionary area with me as to whether some-
13 thing has come up which would surprise him.
14 One thing that was said by Mr. Morehouse was
15 that you had been denied the right to look at
16 a movie. There was testimony by a couple of
17 tellers and I think Mrs. Tatelbaum that they
18 had witnessed a film. I haven't seen the
19 film. Of course, it came in identified as
20 Government's Exhibit 2. Mr. Houlihan at one
21 point wanted to set up a camera and run it,
22 and I decided that with Government's Exhibits
23 3 and 4, which were the nine photographs of
24 what was going on in the bank, and the testimony
25 of the tellers, that really was redundant,
something we did not need to see. That is not

1 deciding the facts for you, but just that we
2 couldn't run on and on and on. There was a
3 movie, and it is not Mr. Houlihan's fault that
4 it was not produced, and I will leave that
5 with you.

6 Now, at this time I am going to tell you
7 what the principles of law are which will govern
8 your deliberations, and it probably will be
9 that as I go through you will find some segments
10 of it that you won't immediately be able to
11 bring to bear upon the case, and later, as
12 you talk and deliberate, I think you will, but
13 there still may be some fuzzy or ambiguous
14 areas and, as I will tell you at the conclusion
15 of the charge, that any such thing as to which
16 you need clarification, rereading or regiving
17 of instructions or of listening to all or part
18 of somebody's testimony, why you send a note
19 to me, we take it up and do it, and so subject
20 to that, we will go forward.

21 You have been told by everybody, including
22 me, that your job in this case is to decide
23 the factual issues. As far as deciding the
24 facts, no one other than you is going to decide
25 them. I have made a couple decisions -- well,

1 one mainly -- as a matter of law, when I said
2 as to Count 2 and Mr. Yagy that there just
3 was not enough evidence in the case that I
4 could permit a jury to make any finding that
5 he could be guilty of that count. Short of
6 that, and except for some situation like that,
7 that is the only one there is -- there is one
8 more and I will get to it later -- all the
9 factual determinations are yours, not the
10 attorneys, they are not mine. If I do make
11 reference to some fact and it varies at all
12 from what you remember, yours is the recollec-
13 tion that controls and not mine. Yours will
14 be the decision. I have made some rulings on
15 objections or motions from time to time during
16 the trial, and I ask you, I instruct you rather,
17 not to read into any of those decisions, whether
18 I sustained an objection or overruled an objec-
19 tion, or did this, that or the other thing,
20 don't read into it any idea that I have some
21 conviction one way or the other on any of the
22 factual issues, including the guilt or innocence
23 of any of these defendants, and even if you
24 should think I do, please ignore it because
25 that is your job, not mine.

1 Now, the Government claims that defendants
2 here participated in a scheme to commit a
3 larceny of the Columbia Savings & Loan Associa-
4 tion in Rochester, and this is alleged to be
5 insured by the Federal Savings & Loan Insurance
6 Corporation, and you have had some proof on
7 that, and that will be one of your determina-
8 tions, as to whether in fact it is, but it is
9 alleged that the defendants committed a larceny
10 there in that savings and loan association.
11 The indictment, as you will see, and the indict-
12 ment will come to you in the jury room, charges
13 actually two categories of crime, and I alluded
14 to this earlier. The first two counts, Count
15 1 and Count 2 are what we call substantive
16 crimes, where the allegations are in Count 1
17 that each of the three men entered the institu-
18 tion with the intent of stealing and purloining
19 money, and so forth, and Count 2 is similar,
20 that they actually were doing something of a
21 substantive nature. Count 3 alleges a crime
22 of conspiracy, and that is a different nature
23 of crime. The basic difference is that with
24 a conspiracy it is the plan or conspiracy to
25 actually do the particular illegal acts which

1 is criminal, it is not the actual doing of
2 the acts themselves. So when I speak of a
3 substantive crime, I am talking about the
4 actual doing of a particular criminal act, and
5 when I speak of a conspiracy, I speak of the
6 planning or the conspiring between or among
7 two or more persons to do an illegal act, and
8 the rules applicable to the two types of crimes
9 are quite different. For simplification,
10 consequently, I will go ahead with Counts 1
11 and 2, which deal with the substantive counts,
12 and put on the side burner for the moment
13 Count 3 which charges conspiracy.

14 Count 1, I will read it to you, again
15 you will have it there before you, it says:
16 "On or about April 9, 1976, in the Western
17 District of New York -- and I will advise you
18 that the Western District of New York comprises
19 seventeen counties, those seventeen counties
20 which lie in the western end of New York State,
21 and include Monroe County -- on or about April
22 9, 1976, in the Western District of New York,
23 James R. Lord, Jr., Gerhard J. Schwartz, and
24 Gerald J. Yagy did enter the Columbia Banking
25 Savings & Loan Association, Rochester, New

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York, the deposits of which were then insured by the Federal Deposit Savings & Loan Insurance Corporation, with intent to commit in such bank a felony affecting such bank, that is, the taking by force and violence and by intimidation and from the presence of employees of such bank, money belonging to and in the care, custody, control and management and possession of the bank, all in violation of Title 18, United States Code, Section 2113(a)."

Title 18 is the Criminal Code of the United States, and that particular section, as far as it is pertinent, says, "Whoever by force and violence or by intimidation takes from the person or presence of another any money belonging to or in the care, custody, control, management or possession of any savings and loan association is guilty of an offense against the United States."

All crimes that we deal with in trials like this are made up of elements, each of which has to be proved by the Government, and as to the crime represented in Section 2113(a), there are three essential elements, each of which must be proved beyond a reasonable doubt,

1 and that phrase "beyond a reasonable doubt"
2 is something I'm going to be using from time
3 to time, and later on in these instructions
4 I will define it for you, the three elements,
5 each must be proved beyond a reasonable doubt
6 to establish the offense charged in Count 1
7 of the indictment, first, that the money taken
8 belonged to or was in the care, custody, control,
9 management or possession of a savings and loan
10 association whose deposits were insured by the
11 Federal Savings & Loan Insurance Corporation;
12 and secondly, that the act or acts of taking
13 such money from the person or presence of
14 another was by force and violence or by
15 intimidation, and third, that such acts were
16 done willfully.

17 The term "savings and loan association"
18 as it is used in Section 2113(a) and also in
19 2113(b), which I will get to when I talk about
20 Count 2, means a savings and loan association,
21 the deposits of which are insured by the
22 Federal Savings & Loan Insurance Corporation.

23 Now, if you should find beyond a reason-
24 able doubt from the evidence in the case that
25 at the time and place of the alleged offense,

1 the Columbia Banking Savings & Loan Association,
2 either alone or jointly with others, had actual
3 or constructive possession of the money described
4 in the indictment, then you may find that such
5 money was in the possession of the association,
6 within the meaning of the word "possession"
7 as used in these instructions and in the
8 statute.

9 The law recognizes two kinds of possession,
10 actual possession and constructive possession,
11 and a person -- I will tell you in this regard
12 that a savings and loan association is a person --
13 a person who knowingly has direct physical
14 control over a thing at a given time is said
15 to be in actual possession of it. A person
16 who, although not in actual possession, knowingly
17 has both the power and the intention at a given
18 time to exercise dominion and control over a
19 thing, either directly or through another
20 person or persons, is said to be in constructive
21 possession of it. The law recognizes also that
22 possession can be sole, in other words, by
23 one's self, or joint. If one person alone has
24 actual or constructive possession, possession
25 is sole. If two or more persons have that

1 possession, then it is joint.

2 Now, you know, I said that the acts
3 charged must have been done willfully, and
4 I gave that to you as the third element of
5 this particular crime. I tell you that an
6 act is done willfully if it is done voluntarily
7 and purposely, and with the specific intent to
8 do that which the law forbids, namely, with
9 the purpose either to disobey or disregard the
10 law. To take or attempt to take by intimidation,
11 which also is used in the statute and in the
12 count of the indictment, means willfully to
13 take or attempt to take by putting in fear of
14 bodily harm, and this must arise from the
15 willful conduct of whoever is accused of
16 doing it, rather than from the mere temper-
17 mental timidity of the victim or of some
18 person involved. However, the victim's fear
19 need not be so great as to result in hysteria
20 or panic or terror. A taking or attempted
21 taking by intimidation must be established
22 by proof of one or more acts or statements
23 by the person accused which were done or made
24 in such a manner and under such circumstances
25 as would produce in the ordinary person

fear of bodily harm. However, actual fear
H. T. Noel & E. F. Knisley

1 need not be proved. Fear, like intent, may
2 be inferred from statements made and acts
3 done by the accused and by the victim as well,
4 and from all of these surrounding circumstances
5 shown by the evidence in the case.

6 I come down to Count 2 of the indictment,
7 and that reads, "On or about April 9, 1976,
8 in the Western District of New York, James R.
9 Lord, Jr., Gerhard J. Schwartz and Gerald J.
10 Yagy, by force and violence and by intima-
11 tion, did take from the personand presence
12 of an employee of the Columbia Banking Savings
13 & Loan Association, Rochester, New York,
14 approximately \$43,365 in money belonging to
15 and in the care, custody, control, management
16 and possession of the Columbia Banking Savings
17 & Loan Association, Rochester, New York, the
18 deposits of which were then insured by the
19 Federal Deposit Savings & Loan Insurance
20 Corporation, and James R. Lord, Jr., Gerhard J.
21 Schwartz and Gerald J. Yagy in committing
22 the aforesaid offense did assault Joan Bauer,
23 Betsy Meisch, Sandra Power and other Columbia
24 Banking Savings & Loan Association, Rochester,
25 New York employees, and did put in jeopardy

1 the life of these employees by means and use
2 of dangerous weapons, all in violation of
3 Title 18, United States Code, Section 2113(d)."

4 I have dismissed Count 2, as far as the
5 defendant, Gerald J. Yagy, is concerned, so
6 you will consider these two charges only
7 insofar as they relate to Mr. Lord and Mr.
8 Schwartz.

9 Again, referring to the statute, 2113(d),
10 it says in pertinent part, "Whoever in committing
11 or attempting to commit any offense defined
12 in Subsection (a) -- that is what I dealt
13 with in Count 1 -- assaults any person or
14 puts in jeopardy the life of any person by
15 the use of a dangerous weapon or device shall
16 be guilty of an offense against the laws of
17 the United States."

18 Again we have essential elements, each
19 one of which must be proved by Mr. Houlihan,
20 representing the Government. There are four
21 in this instance. First, the act or acts of
22 taking from the person or presence of another
23 money belonging to or in the care, custody,
24 control, management or possession of a savings
25 and loan association; the second, the act or

1 acts of taking such money by force or violence
2 or by means of intimidation; third, the act
3 or acts of assaulting or of putting in jeopardy
4 the life of any person by the use of a dangerous
5 weapon or device while engaged in stealing such
6 money from a savings and loan association, and
7 fourth, doing such act or acts willfully.

8 Now, as I have stated before, the burden
9 is always upon the prosecution to prove beyond
10 a reasonable doubt every essential element of
11 the crime charged, and the law never imposes
12 upon a defendant the burden or duty of calling
13 any witnesses or putting in any evidence.

14 This count talks of assaulting a person,
15 and if you should find beyond a reasonable
16 doubt from the evidence in the case that a
17 defendant or defendants did willfully commit
18 the robbery of the savings and loan association,
19 then you must proceed to determine whether
20 the evidence in the case established that
21 that defendant or those defendants in committing
22 such robbery assaulted or put in jeopardy the
23 lives of Joan Bauer, Betsy Meisch or Sandra
24 Power or some other employees, as it is
25 charged in the indictment.

1 Any willful attempt or threat to inflict
2 injury on the person of another, when coupled
3 or combined with an apparent present ability
4 to do so or any intentional display of force,
5 such as would give the victim reason to fear
6 or expect immediate bodily harm, constitutes
7 an assault. An assault can be committed without
8 actually touching or striking or doing the
9 bodily harm to another. So a person who has
10 the apparent present ability to inflict the
11 bodily harm or injury upon another person, and
12 willfully attempts or even threatens to inflict
13 such harm, as by intentionally flourishing or
14 pointing a pistol or a gun at another person,
15 may be found to have assaulted that other person.
16 Now, the test of whether a victim's life has
17 been placed in danger is what we call an objec-
18 tive one, that is, not whether the employee
19 was put in fear, but whether her life actually
20 was put in danger by the use of a dangerous
21 weapon, and in this connection you may consider
22 testimony indicating that a gun was displayed
23 during the robbery of the savings and loan
24 association, although there was no direct or
25 eyewitness evidence that the guns were loaded,

1 with the exception of Mr. Hook's testimony
2 that he saw Mr. Schwartz put two shells into
3 the shotgun. Evidence that a robber displayed
4 a gun to back up his demands may indicate to
5 you that he wanted the victim to believe it
6 was loaded, and you may infer that the gun was
7 loaded from that evidence, under the rules
8 which I will mention later in my instructions
9 to you concerning direct and circumstantial
10 evidence and proper and allowable inferences.

11 Now, a dangerous weapon or device includes
12 anything capable of being readily operated,
13 manipulated, wielded or otherwise used by
14 one or more persons to inflict severe bodily
15 harm or injury on another person. So an
16 operable firearm, such as a pistol, revolver,
17 shotgun or any other gun capable of firing a
18 bullet or other ammunition may be found to be
19 a dangerous weapon or device. If you find that
20 Mr. Schwartz did load the shotgun with two
21 shells, you are entitled to infer that the
22 shotgun at least was operable.

23 To put in jeopardy the life of a person
24 by the use of a dangerous weapon or device
25 means then to expose such person to a risk of

1 death or the fear of death by the use of a
2 dangerous weapon or device.

3 Now, particularly as to the defendant
4 Yagy in Count 1, there has been testimony
5 offered showing that he was not present at
6 the savings and loan association at the time
7 of the alleged robbery. However, the guilt
8 of a defendant, such as Mr. Yagy, may be
9 established without proof that he personally
10 did every act constituting the offense charged.
11 In this connection there is another section
12 of the Criminal Code, Section 2, which says,
13 "Whoever commits an offense against the United
14 States or aids, abets, counsels, commands,
15 induces or procures its commission is punish-
16 able as a principal." So whoever actually
17 does the physical act which is the crime is
18 a principal, and whoever aids or assists or
19 counsels or induces the doing of that act is
20 also a principal and can be convicted and
21 punished as a principal. Every person who
22 willfully participates in the commission of
23 a crime can be found to be guilty of that
24 offense. Now, a participation is willful if
25 it is done voluntarily and intentionally, and

1 with the specific intent to do something which
2 the law forbids or with the specific intent
3 to fail to do something which the law requires
4 to be done, and here, of course, we are con-
5 cerned with the former, and, of course, doing
6 this with a bad purpose, either to disobey
7 or disregard the law.

8 Aiding and abetting is different from
9 the charge of conspiracy, which I will give
10 to you soon. As I stated before, conspiracy
11 involves the planning of a criminal act, and
12 aiding or abetting involves participation in
13 the criminal act. All that is required to
14 be proven to show that a particular individual
15 aided and abetted is that he had actual
16 knowledge of the commission of the robbery,
17 in this instance that he in some way willfully
18 assisted those who committed the robbery or
19 counselled or induced its coming about. Now,
20 in order to aid and abet another -- and the
21 such other could have been Mr. Hook or Mr.
22 Lord or Mr. Schwartz, or two of those three
23 or all three -- to commit a crime, it is
24 necessary that the accused willfully associate
25 himself in some way with the criminal venture,

1 willfully participate in it as he would in
2 something that he wishes to bring about, that
3 is to say, that he willfully seek by some
4 act of his to make the criminal venture
5 succeed. You, of course, may not find the
6 defendant guilty unless you find beyond a
7 reasonable doubt that every element of the
8 offense, as defined in these instructions,
9 was committed by some person or persons, and
10 that the defendant whose guilt or innocence
11 you are considering participated or assisted
12 in its commission. Mere presence at the
13 scene of a crime or mere knowledge that a
14 crime is being or to be committed is not
15 sufficient to establish that a defendant,
16 such as Mr. Yagy, aided and abetted the crime,
17 unless you find beyond a reasonable doubt that
18 he was a participant or assisted, and was not
19 merely a knowing spectator.

20 I come now to the conspiracy count, Count
21 3 of the indictment, and that reads: "From
22 on or about April 9, 1976, and continuously
23 thereafter, up to and including the date of
24 the filing of this indictment, in the Western
25 District of New York and elsewhere, James R.

1 Lord, Jr., Gerhard J. Schwartz and Gerald J.
2 Yagy, the defendants, willfully and knowingly
3 did combine, conspire, confederate and agree
4 with each other and with Ronald Hook, named
5 herein as a co-conspirator but not as a
6 defendant, and with diverse other persons
7 to the grand jury unknown, to commit the
8 following offense against the United States,
9 to wit, a violation of Title 18, United States
10 Code, Section 2113, to willfully and knowingly
11 enter the Columbia Banking Savings & Loan
12 Association, Rochester, New York, and by force
13 and violence and by intimidation take from
14 employees of that bank, the deposits of which
15 were then insured by the Federal Deposit
16 Savings & Loan Insurance Corporation, a sum
17 of money belonging to and in the care, custody,
18 control, management and possession of that
19 bank. All in violation of Title 18, United
20 States Code, Section 371."

21 You will recognize that although that
22 refers generally to Section 2113, that the
23 crime that is talked about is the crime that
24 I have already defined in Count 1, which is
25 a violation of Section 2113(a).

1 There are certain overt acts alleged, and
2 I will explain what that means, but I will read
3 it to you at the moment. It says, "In further-
4 ance of the conspiracy and to effect the
5 objects thereof, the defendants performed the
6 following overt acts: (1) On or about April 9,
7 1976, James R. Lord, Jr. and Gerhard J. Schwartz
8 met with Ronald Hook and drove a 1962 Buick
9 to the Columbia Banking Savings & Loan Associa-
10 tion, Rochester, New York. (2) On or about
11 April 9, 1976, Gerhard J. Schwarz and James R.
12 Lord, Jr. entered the Columbia Banking Savings
13 & Loan Association, Rochester, New York. (3)
14 On or about April 9, 1976, certain money taken
15 from the Columbia Banking Savings & Loan
16 Association, Rochester, New York was placed in
17 a 1975 blue Chevrolet Nova. (4) On or about
18 April 9, 1976, Gerhard J. Schwartz, James
19 Russell Lord, Jr., Ronald Hook and Gerald J.
20 Yagy met with each other at 65 Britton Road,
21 Rochester, New York."

22 Now, this conspiracy is in violation of
23 Section 371 of the Criminal Code, and that
24 says, "If two or more persons conspire to
25 commit any offense against the United States,

1 and one of more of such persons do any act to
2 effect the object of the conspiracy, then each
3 is guilty of an offense against the United States.
4 A conspiracy to violate the law and the doing
5 of an act. A conspiracy is a combination of
6 two or more persons by concerted action to
7 accomplish some unlawful purpose. A conspiracy
8 is a kind of a partnership in crime or for
9 criminal purposes, in which every member becomes
10 the agent of every other member. The gist of
11 the offense is the combination or agreement
12 to violate or disregard the law. Mere similarity
13 of conduct among various persons, and the fact
14 they may have associated with others, and may
15 have assembled together and discussed common
16 aims and interests, does not necessarily prove
17 the existence of a conspiracy. However, the
18 evidence as to conspiracy need not show that
19 the members entered into any express or formal
20 agreement or that they directly by words spoken
21 or in writing stated between or among themselves
22 what their objects or purpose was to be or the
23 details thereof or the means by which the
24 object or purpose was to be achieved. What
25 the evidence must show in order to establish

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1 proof that a conspiracy existed is that the
2 members in some way or manner or through some
3 contrivance positively or tacitly came to a
4 mutual understanding to try to accomplish a
5 common and unlawful plan. It is not necessary
6 for the prosecution to prove that all of the
7 means or methods set forth in the indictment
8 were agreed upon to carry out the conspiracy
9 or that all of the means or methods were actually
10 used or put into operation, but it is necessary
11 that the evidence established to your satisfaction
12 that one or more of the means or methods des-
13 cribed in the indictment was agreed upon to
14 be used in an effort to effect or accomplish
15 some object or purpose of the conspiracy, as
16 alleged in the indictment. Now, one may become
17 a member of the conspiracy without having full
18 knowledge of all of the details of the conspiracy.
19 On the other hand, a person who has no knowledge
20 of a conspiracy, but merely happens to act in
21 a way which furthers an object or purpose of
22 the conspiracy, does not thereby become a
23 conspirator. Before you could find that Mr.
24 Lord or Mr. Yagy or Mr. Schwartz or Mr. Hook,
25 or any other person, became a member of a

1 conspiracy, the evidence must show you that a
2 conspiracy was formed and that the person who
3 is claimed to have been a member knowingly and
4 willfully participated in the unlawful plan
5 with the intent to advance or further some
6 object or purpose of the conspiracy. Now, to
7 participate knowingly and willfully means to
8 participate voluntarily and understandingly
9 and with a specific intent to do some act
10 which the law forbids, that is to say, to
11 participate with bad purpose, either to dis-
12 obey or disregard the law. So if a defendant
13 or any other person with understanding of the
14 unlawful character of a plan intentionally
15 encourages, advises or assists for the
16 purpose of furthering the undertaking or
17 scheme, he thereby becomes a knowing and
18 willful participant, a member, a conspirator.
19 Also one who knowingly and willfully joins
20 an existing conspiracy is charged with the
21 same responsibility as if he had been one
22 of the instigators of the conspiracy.

23 Now, in deliberating on this question
24 of each defendant's knowing participation
25 or membership in the conspiracy, you must

1 consider the evidence as to each defendant
2 individually. You must confine your delibera-
3 tions to the independent evidence as to his
4 own actions, his own conduct, his own statements
5 or declarations, and the reasonable inferences
6 to be drawn from such independent evidence.
7 You cannot base your decision as to whether
8 or not he was a member of the conspiracy on
9 evidence consisting only of the conduct or
10 statements of other defendants or co-conspirators
11 which were made in his absence.

12 I have read the overt acts to you, and an
13 overt act is an act which is knowingly committed
14 by one of the conspirators in an effort to
15 effect or accomplish some object or purpose
16 of the conspiracy. The overt act itself need
17 not be criminal in nature, if it was considered
18 separately and apart from the conspiracy, it
19 can be as innocent as the act of a man walking
20 across the street or driving an automobile,
21 using a telephone. It must, however, be an
22 act which follows and tends toward an accomplish-
23 ment of the plan or scheme, and it must be
24 knowingly done in furtherance of some object
25 or purpose of the conspiracy, as it is charged

1 in the indictment.

2 This crime of conspiracy also is comprised
3 of essential elements, of which there are
4 four. First, that the conspiracy, which is
5 described in the indictment, was willfully
6 formed and was existing at or about the time
7 alleged in the indictment. The indictment
8 speaks from a time from on or about April 9th
9 and continuously thereafter up to and including
10 the date of the filing of the indictment. The
11 date of the filing of the indictment was July
12 29, 1976. The conspiracy which is proved, if
13 any has been proved, started at a time on or
14 about or at least in the first week of April
15 1976 -- I again emphasize if it was formed --
16 and did not last later than April 9, 1976.
17 In other words, this is that other point of
18 where I, as the judge, will tell you as a
19 matter of law that there just is no evidence
20 in the case at all that would enable you to
21 say that the conspiracy continued after April
22 9, 1976. Consequently, I have to tell you
23 that the conspiracy, as far as your considera-
24 tion of it, whether or not it existed, is
25 one that ended with the passing of April 9,

1 1976, and I will tell you further that if you
2 do find there was such a conspiracy, that is
3 companionable and in step with legally the
4 allegations of the indictment, so that even
5 though you look at the indictment and it says
6 from on or about April 9 to July 29, if in
7 fact you find a conspiracy that started on or
8 about April 1 or during the first week of
9 April and ended April 9, I tell you that that
10 would be sufficient to satisfy that first
11 element. The second element is that particular
12 defendant, whose guilt or innocence you are
13 considering, willfully became a member of
14 the conspiracy and, thirdly, that one of the
15 conspirators thereafter knowingly committed
16 at least one of the overt acts charged in the
17 indictment at or about the time or place
18 alleged. I read four overt acts to you. If
19 you are satisfied that a conspiracy came into
20 being, and that individual, whose guilt or
21 innocence you are considering, became a member
22 of it, if you find that at least one of those
23 overt acts did happen, if you find beyond a
24 reasonable doubt that one of them occurred,
25 that is sufficient, you don't have to find

1 two or three of four of them. The fourth
2 element is that the overt act was knowingly
3 done in furtherance of some object or purpose
4 of the conspiracy, as charged. If you should
5 find beyond a reasonable doubt from the evidence
6 in the case that the existence of the conspiracy
7 which is charged has been proved and, as I
8 said, during the existence of the conspiracy
9 at least one of the overt acts was knowingly
10 done by one of the conspirators in furtherance
11 of some object or purpose of the conspiracy,
12 then the proof of the conspiracy offense which
13 is charged is complete, and it is complete
14 as to every person found by you to have been
15 willfully a member of the conspiracy at the
16 time the overt act was committed, regardless
17 of which of the conspirators did the overt
18 act. Now, again, the burden is always upon
19 the prosecution, Mr. Houlihan, and the Govern-
20 ment, to prove beyond a reasonable doubt every
21 essential element of the crime charged in
22 this count, and again the law never imposes
23 upon a defendant, any defendant here, the
24 burden or duty of calling witnesses or pro-
25 ducing any other evidence. Now, if and when

1 it appears from the evidence that a conspiracy
2 existed, and that a defendant was one of the
3 members, then the acts thereafter knowingly
4 done and the statements thereafter knowingly
5 made by any person likewise found by you to
6 be a member of the conspiracy, and while he is
7 a member, can be considered by you as evidence
8 in the case against such defendant, even though
9 the acts and statements may have occurred in
10 the absence and without the knowledge of such
11 defendant, providing the acts and statements
12 were knowingly done and made during the con-
13 tinuance of such conspiracy and in furtherance
14 of an object or purpose of the conspiracy. Now,
15 we have talked preliminarily and also during
16 closing arguments of this dividing three
17 defendants into cubicals, cubbyholes and depart-
18 ments, and this is one area wherein you would
19 not observe any such structuring. If you are
20 satisfied beyond a reasonable doubt that a
21 conspiracy was formed involving one, two or
22 three of these defendants, of course, Mr. Hook
23 is also alleged to have been a member of the
24 conspiracy, if you thereafter find that one
25 of those members of the conspiracy in furtherance

1 of a purpose of the conspiracy did something or
2 said something, even though another defendant
3 who was also a member was not present, what
4 the first individual said or did is chargeable
5 against the other defendant. We have an agency
6 mechanism set up. Once you have found the con-
7 spiracy to exist and particular people to be
8 members of the conspiracy, things that are done
9 and said during that conspiracy and in pursuance
10 of the conspiracy are chargeable against all who
11 are then members of the conspiracy. This is
12 one point where the departmentalization breaks
13 down, otherwise we get back to the departmentali-
14 zation, and any act done or admission or
15 incriminatory statement which is made outside
16 of court by one person cannot be considered as
17 evidence against any person who was not present
18 and did not hear the statement made. Therefore,
19 the acts or statements of any conspirator, which
20 are not in furtherance of the conspiracy or which
21 were made before it came into being or after it
22 ended, can be considered as evidence only
23 against the person doing them or making them.

24 Now, the indictment charges conspiracy
25 against these three defendants and Ronald Hook,

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1 Mr. Hook being named in the indictment as a
2 co-conspirator, as a member of the conspiracy,
3 but not named as a defendant. Now, a person
4 cannot conspire with himself, and therefore
5 you cannot find any defendant guilty of the
6 conspiracy unless you find beyond a reasonable
7 doubt that he participated in a conspiracy
8 with at least one other person, whether it was
9 with one of the other named defendants or with
10 Hook or, as the indictment charges, diverse
11 persons to the grand jury unknown. While the
12 parties to the conspiracy must know of each
13 other's existence, it is not necessary for all
14 of the conspirators to know each other or to
15 have direct contact with each other. In your
16 consideration of the evidence as to the offense
17 of conspiracy, you should first determine
18 whether or not the conspiracy existed, as
19 alleged. If you conclude that the conspiracy
20 did exist, then you next determine whether or
21 not a particular defendant, whose guilt or
22 innocence you are considering, knowingly and
23 willfully became a member of the conspiracy,
24 and if it appears from the evidence beyond a
25 reasonable doubt that the conspiracy was

1 knowingly and willfully formed, as alleged, and
2 that a defendant knowingly and willfully became
3 a member of the conspiracy at its inception or
4 afterward, then the success or failure of the
5 conspiracy to accomplish the common object or
6 purpose is immaterial.

7 Now, an act is done knowingly if it is done
8 voluntarily and intentionally, and not because
9 of mistake or accident or some other innocent
10 reason. The purpose of adding the word "know-
11 ingly" was to insure that no one would be
12 convicted for an act done because of mistake
13 or accident or other innocent reason. Now, with
14 respect to the offense charged in this case,
15 specific intent must be proved beyond a reason-
16 able doubt before there can be a conviction.
17 An intent is the purpose or aim or state of
18 mind with which a person acts or fails to act,
19 and an act or failure to act is knowingly
20 done or not done if it is done voluntarily
21 and intentionally and, again, not because of
22 mistake or accident or other innocent reason.
23 Intent, you will recognize, may be proved by
24 indirect or circumstantial evidence, and rarely
25 can be proved by any other means, because while

1 witnesses can come into the courtroom, and
2 they can see and hear and come in and say what
3 they have seen and heard, they cannot, of course,
4 have any look into any inner reaches of the
5 mind so they can come in before you and say
6 what a person's state of mind is. So unless
7 otherwise instructed, in determining any issue
8 involving intent, you can consider all of the
9 facts and circumstances, which are in evidence
10 in the case, which will aid you in determining
11 from the same what the intent was.

12 Now, generally there are certain rules of
13 law, and I have mentioned some, which are common
14 to all criminal cases and which you must apply
15 in your reviewing the evidence which is before
16 you. A basic rule in all criminal cases is
17 that a defendant, in this case each defendant,
18 is presumed to be innocent, and that presumption
19 of innocence remains with each defendant
20 throughout the trial, and continues to exist
21 until such time as each of you, as a matter of
22 fact, all of you, unanimously have been convinced
23 beyond a reasonable doubt by legal and competent
24 evidence that a particular defendant is guilty
25 of the offense or offenses charged. The burden

1 of proof, as I have said, that a person is
2 guilty beyond a reasonable doubt rests with
3 the Government at all times, it never shifts
4 to a defendant. In order to sustain its burden,
5 the Government must present proof which is
6 sufficiently strong to convince each of you
7 of a defendant's guilt beyond a reasonable
8 doubt. Now, the requirement that the prosecution
9 prove a defendant's guilt beyond a reasonable
10 doubt extends to every essential element of
11 a crime charged against him, but in determining
12 whether the guilt of a defendant as to each
13 and every essential element of a crime has been
14 established, you are not limited to the proof
15 from the Government's witnesses. If you are
16 satisfied from a review of all of the evidence
17 in the case, both the Government's and the
18 defendants', that the evidence as to a particular
19 account established guilt beyond a reasonable
20 doubt, you may convict such defendant on that
21 count but, on the other hand, if you have a
22 reasonable doubt at any point with respect to
23 a particular count under consideration, then
24 you must acquit the defendant on that count,
25 you must declare him not guilty. You will, of

1 course, be separately weighing and determining
2 the evidence as to each count of the indictment,
3 that is, you will determine the guilt or innocence
4 of each defendant as to each count of the indict-
5 ment separately.

6 I promised to define the term "reasonable
7 doubt." A reasonable doubt is a doubt which is
8 based upon reason and common sense, and arises
9 from the state of the evidence. Of course, it
10 is rarely possible to prove anything to an
11 absolute certainty, so proof beyond a reasonable
12 doubt is established if the evidence is such as
13 you would be willing to rely and act upon in
14 the most important of your own affairs. The
15 defendant is not to be convicted on mere sus-
16 picion or conjecture. A reasonable doubt may
17 arise not only from the evidence produced, but
18 also from a lack of evidence. Because the
19 burden is upon the prosecution to prove beyond
20 a reasonable doubt that the defendant is guilty
21 of every essential element of each of these
22 crimes charged, a defendant has the right to
23 rely upon the failure of the prosecution to
24 establish such proof, and a defendant may also
25 rely upon evidence brought out on cross

1 examination of the prosecution's witnesses and,
2 again, the law does not impose upon the defendant
3 the duty of producing any evidence. Now,
4 remember that a reasonable doubt is such a
5 doubt as is based upon reason and as appeals
6 to your power of logic. It is a doubt for
7 which you have a reason, whether or not you
8 have the ability to put that reason into words.
9 It is a doubt arising out of something tangible
10 in the evidence in the case or something lacking
11 in the case. You are to distinguish it from a
12 doubt which might be based upon some emotion,
13 such as upon a whim or fancy or a feeling. If
14 you feel uncertain and you are not fully con-
15 vinced that a defendant is guilty of the crime
16 charged, and you believe you are acting in a
17 reasonable manner, and you believe a reasonable
18 man or woman in any matter of like importance
19 would hesitate to convict because of such a
20 doubt as you have, that is a reasonable doubt,
21 to the benefit of which the defendant is
22 entitled. If you have such a doubt you must
23 acquit such defendant, you must find him not
24 guilty. A reasonable doubt in your mind as
25 to any essential element of the crime entitles

1 a defendant to an acquittal of that particular
2 crime. However, the rule that the Government
3 must prove every essential element of a crime
4 beyond a reasonable doubt does not mean that
5 you have to believe the testimony of every
6 Government witness as being true beyond a
7 reasonable doubt or that each piece of evidence
8 that the Government has offered is true beyond
9 a reasonable doubt. It only means that the
10 credible evidence, as weighed and found by you
11 under these instructions, and as viewed as a
12 whole, must establish every essential element
13 of the crime and of the defendant's guilt
14 beyond a reasonable doubt.

15 Now, as the sole judges of the facts, you
16 have to determine which of the witnesses you
17 believe, what portion of their testimony you
18 accept, and what weight you attach to it. At
19 times during the trial I sustained objections
20 to questions which were asked and I did not
21 let the witness answer, and on a couple of
22 occasions where an answer was made I instructed
23 you that it was stricken from the record, and
24 I told you to disregard it and dismiss it from
25 your minds. So you may not draw any inference

1 from an unanswered question or from any evidence
2 that I have stricken from the record. The law
3 requires that your decision be made solely
4 upon the competent evidence which you have
5 before you, and items such as that that I have
6 excluded from your consideration are not legally
7 admissible and they must not be considered.
8 Each defendant is entitled to have his guilt
9 or innocence as to each of the offenses charged
10 determined from his own conduct and from the
11 evidence which applies to him, as if he were
12 being tried alone. The guilt or innocence of
13 any one defendant of any of the crimes charged
14 should not influence your verdict as respecting
15 the other defendants. You may find any one
16 or more of the defendants guilty or not guilty,
17 nevertheless you must relate the evidence only
18 as to that defendant or those defendants for
19 whom it is received. In any event, you must
20 determine the guilt of a defendant as to each
21 separate charge by giving consideration to the
22 evidence which applies to him as to each
23 count. Now, again, that sounds like depart-
24 mentalization, and it is, the single exception
25 is I have noted as to Count 3, when you are

1 dealing with conspiracy, and I won't repeat
2 that, you have in mind that that is the exception
3 to that departmentalization.

4 You have to decide, and you are the sole
5 ones to do it, concerning the credibility, the
6 believability of the witnesses, and the weight
7 which their testimony deserves. You should
8 carefully scrutinize the testimony given and
9 the circumstances under which each witness has
10 testified, and every matter in evidence which
11 tends to indicate whether a witness is worthy
12 of belief. Now, a witness in the course of
13 his or her testimony may have acknowledged
14 a criminal record or admitted other unlawful
15 or reprehensible conduct or activities, perhaps
16 even admitted lying in the past. Naturally,
17 you will cautiously and carefully weigh all
18 such facts and circumstances to determine what
19 effect, if any, those facts and circumstances
20 may have upon such witness's believability.
21 Similarly, you can consider any bias or
22 prejudice which may have been demonstrated by
23 a witness or any demonstrated hope of leniency
24 or reward to be gained through testifying.
25 Now, this is not to say that because a given

1 witness may be a rather unsavory character in
2 some respects that you not credit his or her
3 testimony on the stand. You are to judge each
4 witness's intelligence, motive and state of mind,
5 and demeanor and manner while on the stand.
6 Judge also any relation each witness may bear
7 to either side of the case, and the manner in
8 which any witness may be affected by the verdict,
9 and the extent to which, if at all, each witness
10 is either supported or contradicted by other
11 evidence. Now, of course, the mere fact that
12 the testimony of a witness is inconsistent or
13 that there are discrepancies in such testimony
14 does not mean that you have to reject the
15 witness's credibility. You must determine
16 whether the inconsistency or discrepancy is
17 a result of falsification or whether, on the
18 other hand, it is a result of innocent mis-
19 calculation or inaccurate observation or memory.
20 If you find that any witness has lied, has
21 testified falsely with respect to any material
22 portion of his or her testimony, you may dis-
23 regard that portion which you find to be
24 unbelievable or, if you want, you may disregard
25 the entire testimony of that witness. Now,

1 in evaluating credibility, of course, you will
2 determine whether or not the testimony of a
3 given witness was inherently improbable or con-
4 tradictory with respect to any material fact,
5 as judged by your experience and by other
6 evidence in the case, and relating back to
7 this disregarding of all or a portion of the
8 witness's testimony where you found the witness
9 lied or testified falsely, a person only
10 testifies falsely or lies if he does so
11 intentionally, and you have to distinguish
12 that from something that may merely be
13 erroneous because of some mistake or innocent
14 miscalculation or some inaccurate observation
15 or some faulty memory.

16 Now, normally, as you have observed,
17 witnesses are not permitted to state their
18 opinions, and are only permitted to come in
19 here until what they have seen or heard or
20 done or said, but there are some persons who
21 can come into a courtroom who are deemed to
22 be experts in certain callings or fields due
23 to their particular training and experience,
24 and they are permitted to give their opinions
25 in that particular field of expertise. We had

1 two such in this case, Dr. Abello and Dr.
2 Newton, who are experts in their respective
3 fields. Now, these are given to you for your
4 consideration, and you are to consider such
5 opinion testimony if and to the degree you
6 find it reliable. You may disregard it if you
7 find either witness was not sufficiently
8 expert or if the reasons stated from the opinion
9 does not support the opinion or if you find
10 that the opinion is not credible in view of
11 all the other evidence in the case. These
12 doctors' opinions can be and were based upon --
13 well -- they can be based upon what we call
14 objective findings, which might be a situation
15 where a doctor by palpation can actually feel
16 muscle spasm, or whereas to Mr. Schwartz he
17 underwent a myelogram testing and that
18 certain results were shown from that, these
19 would be objective findings, or the opinion
20 could be based upon what we call subjective
21 findings or considerations, which would be
22 the patient's own claims of pain, or a
23 combination of both. Now, to the extent that
24 a doctor's opinion is based on what the patient
25 told the doctor, you have to consider the

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1 reliability and credit to be given to the
2 patient's statements to the doctor and, of
3 course, if they are not reliable then, of
4 course, the doctor's opinion founded thereupon
5 would also not be relied upon.

6 We had identification testimony here as
7 to all of the defendants as being the persons
8 who did certain criminal acts, and this is a
9 key element of the Government's burden of
10 proof in this case, and in considering identi-
11 fication testimony you are to keep in mind
12 that such testimony should be considered with
13 great caution. There is no class of testimony
14 that is more uncertain or least to be relied
15 upon than that as to identity. Identification
16 testimony is an expression of belief or
17 impression by the witness. Its value depends
18 again on the opportunity the witness had to
19 observe the offender at the time of the offense
20 and to make a reliable identification at a
21 later point. I think in this case we depart
22 from the normal identification problem
23 if one of these robbers or both of them had
24 come into the bank without being masked so
25 their features would be observed and remembered

1 by someone, and a teller or someone else in
2 the bank came forward later and said yes, this
3 happened and that happened, and this is the
4 man that did it, then you would be worried
5 more about how much of an opportunity the
6 tellers had or the other person had to observe
7 the robber and how dependable that was. In
8 our situation in our case we do not truly
9 have that, except in the situation of Mr.
10 Wakefield in his identification of a person
11 who was introduced to him as Jimmy, and the
12 result of that was that Mr. Wakefield indicated
13 that he was not at all positive that Mr. Lord
14 was the Jimmy who was there earlier in April
15 with Mr. Schwartz at Mr. Wakefield's home.
16 He thought he was, but he wasn't positive.
17 Now, on that type of situation you have to
18 judge Mr. Wakefield's opportunity to really
19 see and remember what this Jimmy looked like,
20 and to remember at this time. Otherwise, we
21 have a situation where Mr. Hook, if you believe
22 him, having a long time acquaintance with say
23 Mr. Yagy, says this is Mr. Yagy, where he,
24 again if you believe him, had certain things
25 to do over the period of time with Mr. Lord,

1 and to a lesser period of time with Mr.
2 Schwartz. Now, I think we are in an area where
3 we come basically to the credibility of the
4 witness, rather than questions of opportunities
5 for observations and circumstances where the
6 identification testimony would be reliable.
7 Now, I emphasize, of course, that it is an
8 important burden of proof that the prosecutor
9 has as to every element of the crime and, of
10 course, it specifically includes the burden
11 of proving to you beyond a reasonable doubt
12 the identify of a defendant as a perpetrator
13 of the crime of which he is charged. Now, if
14 you do have a reasonable doubt as to the
15 accuracy of identification, and you find that
16 otherwise a particular defendant has not been
17 shown to your satisfaction and beyond a
18 reasonable doubt to have been a participant,
19 then you would find that defendant not guilty.

20 Mr. Ronald Hook I have mentioned and, of
21 course, he stands in a particular situation
22 in this case. The indictment charges him in
23 Count 3 with being a co-conspirator. He is
24 not named as a defendant, and Mr. Houlihan
25 has argued to you concerning that and why it

1 comes about, but from his own testimony he
2 has involved himself in this bank robbery of
3 the savings and loan association and, conse-
4 quently, we have to consider him as being an
5 accomplice in the carrying out of this robbery.
6 Now, an accomplice is one who unites with
7 another person in the commission of a crime
8 voluntarily and with common intent, and an
9 accomplice does not become incompetent as a
10 witness because of participation in the
11 criminal act charged but, on the contrary,
12 his testimony can be received in evidence
13 and can be considered by you even though it
14 is not corroborated or supported by other
15 evidence. You have to keep in mind that such
16 testimony is to be given close and searching
17 scrutiny, and is to be received with caution
18 and weighed with great care. You are not to
19 convict a defendant upon the unsupported
20 testimony of an accomplice unless you believe
21 that unsupported testimony beyond a reasonable
22 doubt. Mr. Houlihan, of course, has argued
23 that Mr. Hook was an innocent pawn. You
24 may find that is true or you may find that
25 Mr. Hook, despite his age, was quite sophisti-

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1 cated and aware of what was going on. Even
2 if you find the latter, that he had himself
3 all kind of evil knowledge, motivation and
4 voluntary participation, eager participation
5 perhaps, and he comes to the witness stand
6 in that guise, this does not mean that you
7 automatically must say that his testimony is
8 not credible. It is up to you to decide with
9 all of those circumstances in mind, and as
10 you watched him and heard him, whether or not
11 you believed him. Now, if you do believe him,
12 and you find that what he was saying was true,
13 then you can rely upon that, even though
14 there may be certain important areas, many
15 important areas of his testimony that you find
16 supported in other evidence in the case. In
17 judging the testimony of Mr. Hook you have
18 to follow those instructions, it is very
19 important.

20 Generally there are two types of evidence
21 from which you can find a defendant guilty.
22 We have direct evidence or eyewitness evidence,
23 where someone has seen or heard something or
24 himself done or said something, and comes
25 on the witness stand and testifies directly

1 about that, and this is called direct evidence
2 or eyewitness evidence. But, on the other
3 hand, we also have circumstantial evidence,
4 where proof of a chain of circumstances point
5 to the commission of an offense, and you are
6 entitled to and you may find we have both
7 types of evidence in this case, and that they
8 bear upon the question of the innocence or
9 guilt of a defendant, and you can consider
10 both types. As a general rule, the law
11 makes no distinction between direct and
12 circumstantial evidence. It simply requires
13 that before a defendant is convicted that
14 you be satisfied of his guilt beyond a
15 reasonable doubt.

16 I mentioned inferences at one point.
17 Basically an inference is nothing more than
18 a deduction or a conclusion which reason
19 and common sense lead you to draw from facts
20 which have been proven. Any inference which
21 you draw from the evidence must reasonably
22 flow from the evidence, and be based upon
23 facts established by the evidence. Because
24 a permissible inference in law must flow
25 naturally and logically from and be based on

1 facts established by the evidence, it follows
2 that you may not base further inferences merely
3 upon inferences already drawn. One inference
4 may not be based upon or drawn from another
5 inference. It can only be based upon or drawn
6 from evidence which you find in the case. Now,
7 in the course of your consideration of all of
8 the evidence as to a particular defendant and
9 a particular crime, if you find certain evidence
10 admits equally of two inferences, one supporting
11 his innocence and the other supporting his
12 guilt, you must accept the inference supporting
13 his innocence and you must reject the inference
14 supporting his guilt.

15 Now, conduct of a defendant, and that can
16 include statements knowing they made acts
17 knowing done, upon being informed that a
18 crime has been committed or upon being con-
19 fronted with a criminal charge can be considered
20 by you in the light of all other evidence in
21 the case in determining his guilt or innocence.
22 When a defendant voluntarily and intentionally
23 offers an explanation or makes some statement
24 tending to show his innocence, and this explana-
25 tion or statement is later shown to your

1 satisfaction to be false, you may consider
2 whether this circumstantial evidence points
3 to a consciousness of guilt. Ordinarily it
4 is reasonable to infer that an innocent person
5 does not usually find it necessary to invent
6 or fabricate an explanation or statement
7 tending to establish his innocence. Whether
8 or not evidence as to a defendant's voluntary
9 explanation or statement points to a conscious-
10 ness of guilt, and the significance to be
11 attached to any such evidence, are matters
12 exclusively within your province. Again, a
13 statement or act is knowingly made or done if
14 it is made or done voluntarily and intentionally,
15 and not because of mistake or accident or other
16 innocent reason.

17 Always bear in mind that the law never
18 imposes upon a defendant in a criminal case
19 the duty or burden of calling any witnesses
20 or producing any evidence. We have evidence
21 in the case that the defendant Schwartz has
22 made several statements, particularly a certain
23 statement. The evidence relating to any state-
24 ment claimed to have been made by a defendant
25 outside of court and after a crime has allegedly

1 been committed should always be considered
2 with caution and weighed with great care, and
3 only after all evidence in the case convinces
4 you beyond a reasonable doubt that the state-
5 ment was knowingly made. Now, in determining
6 whether a statement claimed to have been made
7 by a defendant outside of court and after a
8 crime has allegedly been committed was knowingly
9 made, you should consider the defendant's age
10 and sex and training and education and occupa-
11 tion, and his physical and mental condition,
12 and his treatment while in custody or under
13 interrogation, as shown by the evidence in the
14 case, and also all other circumstances in
15 evidence surrounding the making of the state-
16 ment, including whether before the statement
17 was made the defendant knew or had been told
18 and understood that he was not obliged or
19 required to make the statement claimed to have
20 been made by him, that any statement which he
21 might make could be used against him in court,
22 that he was entitled to the assistance of
23 counsel before making any statement, either
24 oral or in writing, and that if he was without
25 money or means to retain counsel of his own

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1 choice, an attorney would be appointed to
2 advise and represent him free of cost and
3 obligation. Now, a statement is knowingly
4 made if it is made voluntarily and intentionally,
5 and not because of mistake or accident or other
6 innocent reason. If the evidence in the case
7 does not convince you beyond a reasonable
8 doubt that a statement was made voluntarily
9 and intentionally, you should disregard it
10 entirely. On the other hand, if the evidence
11 in the case shows beyond a reasonable doubt
12 that the statement was in fact voluntarily
13 and intentionally made by the defendant, you
14 may consider it as evidence in the case against
15 the defendant. Mr. Schwartz's admissions, if
16 you find them to have been made voluntarily
17 and intentionally, can be used only as against
18 him. Any conspiracy to rob the savings and
19 loan association had by November 22, 1976 come
20 to an end, and, of course, you will remember
21 that that was the date as of which that
22 statement was given. His statement as of that
23 date could not be chargeable to any co-conspirator
24 if, in fact, you found there was a conspiracy
25 and that he and another defendant were members

1 at some time. As I have indicated to you,
2 there is no evidence to support the continuance
3 of the conspiracy beyond April 9, 1976. In
4 any event, you would recognize that an admission
5 of guilt would not be an act or statement in
6 furtherance of the aim of the conspiracy.
7 However, I tell you this one thing, if you
8 have found that there was a conspiracy and
9 that Mr. Schwartz was a member of the conspiracy
10 on April 9, 1976, which is the alleged date
11 of the robbery of the savings and loan associa-
12 tion, and if you find that, for example, Mr.
13 Yagy or Mr. Lord was also a member of that
14 same conspiracy at the same time, and if you
15 decide on the basis of the admission, and other-
16 wise, that Mr. Schwartz did what he says in
17 the statement he did do, then what he did do
18 on April 9, 1976 could be usable against and
19 charged against those other defendants who
20 you found to be members at that same time.
21 So the making of the statement on November 22nd
22 cannot itself be used against any other defen-
23 dants, but if on the basis of that, and otherwise,
24 you find that Mr. Schwartz, for example, did
25 participate in a robbery of this association on

1 April 9, and there was a conspiracy for that,
2 and Mr. Lord or Mr. Yagy was a member, then
3 Mr. Schwartz's actions on the 9th of April
4 are chargeable against Mr. Lord or Mr. Yagy
5 if they were members at that time.

6 Now, you are instructed as a matter of
7 law that you are not to be influenced by the
8 fact that the Government of the United States
9 is a party to this action. The Government is
10 the same as any other party, Mr. Houlihan,
11 the Assistant United States Attorney, is the
12 same as any lawyer. The Government is the
13 prosecutor, and I told you -- maybe I told
14 you, maybe I did not -- but in any event, we
15 are not here trying lawyers or deciding
16 which lawyer is a better lawyer or more to
17 be liked or less to be liked than some other,
18 you are here to try the guilt or innocence
19 of three defendants, and whether you like
20 lawyers or don't like them, you are to put
21 that matter aside, and you are to determine
22 merely the guilt or innocence of the defendants.
23 Also, you are not to concern yourselves in
24 any way with the punishment which a particular
25 defendant might receive if he is convicted,

1 because punishment will be a matter with which
2 only I would be concerned, and only, of course,
3 if you would convict particular defendants on
4 one or more of the charges that are levelled
5 against him. Again, you are the ones to find
6 the facts, and any examples which I have given
7 do not indicate any opinion of mine, except
8 my flat declaration to you as to the time of
9 termination of the conspiracy, otherwise you
10 are the ones who make the decisions.

11 Now, when you come to a verdict, the
12 verdict as to the guilt or innocence of each
13 defendant, it has to be reached unanimously,
14 with all twelve of you agreeing in the result.
15 Under these instructions you can find one or
16 more of the defendants guilty as charged or
17 innocent, or any time during your deliberations
18 you can come into court with a verdict of
19 guilty or not guilty as to any defendant con-
20 cerning whom you unanimously agree. In the
21 normal course, unless you run into some pitfalls,
22 you would be pursuing your whole deliberation
23 and reaching your verdict as to each defendant
24 on each count and reporting them at one time
25 in court. But if we run into sticky situations,

1 you can, of course, report a verdict of
2 innocence or guilt as to any defendant on
3 any count where you have unanimously agreed.
4 You have to give separate and personal considera-
5 tion to the case of each defendant. You must
6 analyze what the evidence in the case shows
7 with respect to that individual, leaving out
8 entirely any evidence, if any, which has been
9 admitted solely against some other defendant.
10 Each defendant is entitled to have his case
11 determined from the evidence as to his own
12 acts and statements and conduct, and any other
13 evidence in the case which may be applicable
14 to him.

15 I am sending a copy of the indictment
16 to the jury room with you, actually the original
17 indictment. It has been marked Court Exhibit
18 C. I told you before, and I tell you again,
19 the indictment is not evidence, it is merely
20 a device which we use to tell these defendants
21 of the charges which have been lodged against
22 them. You are not to consider it as tending
23 to prove or proving anything whatsoever.

24 Now, finally, I would remind you of the
25 oath you took that you would well and truly

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1 try these issues joined in this case and a
2 true verdict give according to the evidence,
3 so help you God. I tell you if you follow
4 that oath and apply that oath, and you do
5 not combine your thinking with any emotion,
6 that you will arrive at a true and just ver-
7 dict. But if you get into an emotional state,
8 and you let bias or sympathy or prejudice
9 interfere with your thinking, you will not
10 arrive at a true and just verdict. As you
11 deliberate, listen to the opinions of the
12 other jurors, and ask for an opportunity to
13 express your own views. No one juror holds
14 center stage in the jury room, and no one juror
15 monopolizes the deliberations. After you
16 have listened to the other jurors and you
17 have stated your own views, if you become
18 convinced that your view is wrong, do not
19 hesitate because of stubbornness or pride of
20 opinion to change your view. On the other
21 hand, do not surrender your honest conviction
22 solely because you are outnumbered.

23 Now, as I say, your verdict must be
24 unanimous, it must represent the absolute

25 conviction of each one of you. You will

1 have several verdicts to render. As to Count
2 1, you must decide whether James R. Lord, Jr.
3 is guilty or innocent, guilty or not guilty
4 of the charge of having violated Section 2113(a)
5 or having aided or abetted such violation by
6 another. You must decide whether Gerhard
7 J. Schwartz is guilty or innocent of having
8 violated that same section or having aided or
9 abetted someone else in violating it, and you
10 must make that same decision relative to Gerald
11 J. Yagy, again as to whether he violated the
12 section or whether he aided or abetted such
13 violation by another. Then as to Count 2,
14 you have the same decision relative to James
15 R. Lord concerning Section 2113(d), whether
16 he violated it or whether he aided and abetted
17 violation by another, and you have that same
18 decision and verdict concerning Mr. Schwartz.
19 As to Count 3, again we have all three defen-
20 dants involved, and you have to decide whether
21 each one violated Section 371, which was the
22 statute concerning conspiracy, by conspiring
23 with another person to violate Section 2113(a).

24 Now, finally, as you go to the jury room,

25 as your first order of business, you should

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1 select some one of your number who will speak
2 for you when you come back into the courtroom,
3 and all communication that you have from the
4 deliberation room will come to me by means of
5 a note that you will hand to the deputy
6 marshal who will be on duty outside of your
7 room, and the deputy marshal will see that I
8 get the note, and I will act accordingly. Do
9 not ask the deputy any questions about your
10 duties. You can ask me questions, you can get
11 a clarification of any instructions or a
12 reading of my instructions or all or part of
13 the testimony of any witness. Tell me also
14 when you have reached a verdict, tell me by
15 a note when you have reached a verdict, or in
16 appropriate circumstances where you find you
17 just are not able to reach a verdict, tell
18 me also that, but never tell me or anyone else
19 how your voting stands at any certain time,
20 some intermediate time, except when you come
21 into court to report a verdict of guilt or
22 innocence as to a defendant on a count.

23 Now, gentlemen, do you have any exceptions
24 or requests and, if so, do you want to be

25 heard outside the presence of the jury?

1 MR. HOULIHAN: No requests or exceptions, your Honor.
2 MR. KREMER: The defendant Lord has one request and one
3 exception. We will be bound by whatever the
4 Court decides as to where and when it is heard?
5 THE COURT: Mr. Morehouse?
6 MR. MOREHOUSE: No requests or exceptions.
7 THE COURT: Mr. Colicchio?
8 MR. COLICCHIO: Yes. On behalf of the defendant Yagy, I re-
9 quest that the Court charge the jury that it
10 can't find Mr. Yagy was a member of the conspiracy
11 by reason of Mr. Schwartz's statement, attributed
12 to him, that occurred sometime in November.
13 THE COURT: That is true. I said when you are determining
14 whether someone is a member of the conspiracy,
15 you must look only to that person's own acts
16 and statements, you do not look to anything
17 someone else did or said outside of that
18 person's presence. So as to Mr. Yagy, you
19 must look to what he did, what he said, or
20 what was done or said in his presence in deter-
21 mining whether or not Mr. Yagy was a member
22 of the conspiracy.
23 MR. COLICCHIO: Thank you.
24 THE COURT: Tell me at sidebar.
25 MR. KREMER: Surely.

1 THE COURT: Then I will decide whether it should be out
2 in the presence of the jury.

3
4 (Thereupon an off the record discussion ensued
5 at the sidebar.)
6

7 THE COURT: I think I have said this twice, but again I
8 want to make sure you understand. This concerns
9 the statement made by Mr. Schwartz on November
10 22, 1976. The giving of the statement, obviously,
11 at a time when there was no longer a conspiracy
12 cannot itself weigh against any other defendant.
13 If from the statement, and with or without
14 other evidence, you decide that Mr. Schwartz
15 on April 9, 1976 did certain acts in the bank
16 robbery, and if you have found that there was
17 a conspiracy at that time, and Mr. Schwartz
18 was a member at that time, and another defendant
19 or defendants was a member at that time, then
20 those actions of Mr. Schwartz on the 9th can
21 be used against the other defendants, but his
22 statement made later cannot be. Does that meet
23 your approval?

24 MR. KREMER: Just to again emphasize the statement itself
25 cannot --

1 THE COURT: I said it three times.

2 MR. KREMER: Thank you, your Honor. All right. Swear the
3 deputy marshals.

4

5 (Thereupon two deputy marshals were duly sworn.)

6

7 THE COURT: I will say one thing, I've been guilty of
8 another misjudgment of time, I said forty
9 minutes, and I think I went twice that long.
10 I am sorry. All right, the exhibits will
11 come to you in the jury room, the indictment
12 will be there as Court Exhibit C. Mr. Miller,
13 you will have to remain behind. I assume
14 you have some clothing in the jury room?

15 ALTERNATE JUROR: Yes, your Honor.

16 THE COURT: We will see that is gotten out for you.

17

18 (Thereupon the jury exited the courtroom at
19 2:40 P.M.)

20

21 THE COURT: Mr. Miller, this has to be in some regards
22 an unsatisfactory end to the long hard week,
23 whereafter paying close attention to the
24 evidence, and I observed that you were through-
25 out, you are now foreclosed from participating

1 in reaching the verdict, but this is the role
2 of the alternata juror and, of course, you
3 have been here, necessarily, as our insurance
4 policy in case something happens. We did have
5 to make use of Mrs. Adams as the first alternate,
6 luckily nothing else occurred to make you a
7 regular juror. I appreciate very much your
8 having been here, and the one good you get
9 out of it is that you are now free to go instead
10 of hanging around. We will let you know when
11 next we need to have you back. Meanwhile, I
12 wish the best for you and your wife. I under-
13 stand you are going to be again a father?

14 ALTERNATE JUROR: Yes, your Honor, anytime now.

15 THE COURT: That is very good. Now, as far as talking
16 with the attorneys or any parties, I leave
17 that completely up to you. There is no obliga-
18 tion on your part to talk with anybody. You
19 may, if you want. The only request in this
20 instruction I make is that you do not talk
21 with anyone until after the jury has returned
22 its verdict. After that you would be free,
23 if you want.

24 ALTERNATE JUROR: Yes, I understand.

25 THE COURT: Thank you. Mr. Walsh will see that you get

1 your clothing out. Mr. Kremer, there was
2 one additional request which I indicated I
3 was refusing, and I will allow you an oppor-
4 tunity to put that on the record at this time.

5 MR. KREMER: Thank you, your Honor. "There has been testi-
6 mony that the person identified as James
7 Russell Lord, Jr. was known and introduced
8 to Mr. Hook as Jimmy O'Brien. The use in
9 the indictment or in this court by myself,
10 i.e., the presiding judge, of the name James
11 Russell Lord, Jr. is not to be implied as
12 indicating that I have established his identi-
13 fication or that the Government proved this
14 relationship beyond a reasonable doubt. The
15 name James Russell Lord, Jr. is used by myself
16 because that is the name of the defendant
17 seated here in this courtroom. It is for
18 you, the jury, to decide whether this identi-
19 fication has been established beyond a reason-
20 able doubt." Thank you.

21 THE COURT: I refused to give that further request, you
22 have the exception.

23
24 (Thereupon the court was in recess at 2:45 P.M.)

25
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1 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:45 P.M.

2
3 (Defendants present, counsel present, jury
4 absent.)

5
6 THE COURT: I have a note from the jury, two points, one,
7 "May we hear Mr. Hook's testimony as to the
8 morning of April 9, 1976, prior to the arrival
9 at the bank." Two, "Also would you please
10 explain again the 'intent' in respect to Mr.
11 Yagy on Count 1 of the indictment?" Let's
12 see, as far as Mr. Yagy is concerned and this
13 "intent" on Count 1 -- off the record.

14
15 (Thereupon an off the record discussion ensued.)

16
17 THE COURT: Thinking ahead to any cross examination, I
18 don't know if we really in any instance ever
19 got back to the happening on the morning of
20 the 9th --

21 MR. KREMER: No, your Honor.

22 THE COURT: -- prior to reaching the bank. I don't think
23 any of the cross examination really reached
24 into that area.

25 MR. KREMER: No, your Honor, not by defendant Lord at least.

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1 THE COURT: I don't remember anything. Mr. Colicchio,
2 is there any of yours that applied to that
3 area?

4 MR. COLICCHIO: No, I didn't go into the question of Yagy going
5 to the Tiptop Restaurant. Is this after the
6 restaurant, when they got to Genesee Valley
7 Park?

8 THE COURT: No, it is the testimony immediately prior to
9 the robbery, prior to the arrival at the bank.

10 MR. COLICCHIO: Well, at what stage, your Honor.

11 THE COURT: The testimony as to the morning of April 9,
12 prior to the arrival at the bank. This is
13 the time period from seven thirty in the morning
14 when he said that Mr. Yagy knocked on his door,
15 they arrived at the bank at nine o'clock, it
16 is that time span.

17 MR. COLICCHIO: My interest is what part of the morning are
18 they talking about?

19 THE COURT: An hour and a half, seven thirty A.M. to
20 nine A.M.

21 MR. COLICCHIO: That is what they asked for?

22 THE COURT: Exactly what they asked for. I was wondering
23 whether any part of your cross examination
24 bore upon that?

25 MR. COLICCHIO: I don't recall getting into that.

1 THE COURT: I see nothing except the portion you have.
2 All right.
3
4 (Thereupon the jury entered the courtroom at
5 3:55 P.M.
6
7 THE COURT: Now, who is speaking for the jury?
8 JUROR #1: I am.
9 THE COURT: Miss Adams, I have your note, two points, one,
10 "May we hear Mr. Hook's testimony as to the
11 morning of April 9, 1976, prior to the arrival
12 at the bank?" We found that, and we will
13 read it. Two, "Also would you explain again
14 the 'intent' in respect to Mr. Yagy on Count
15 1 of the indictment?" I will do that. Mr.
16 Noel, will you read that part of Mr. Hook's
17 testimony?
18
19 (Thereupon reporter read from Page 457, Line
20 5 to Page 466, Line 12.)
21
22 FORELADY: That is all we wanted to hear.
23 THE COURT: As to the second question, the intent with
24 respect to Mr. Yagy on Count 1. Of course,
25 Count 1 is an allegation that the three

1 individuals entered savings and loan association
2 with the intent of committing the robbery, and
3 there is nothing in the evidence which shows
4 that Mr. Yagy entered the bank. So as far as
5 he is concerned, his responsibility, as far
6 as Count 1, could only be as an aider and
7 abettor. I will give you that portion of my
8 charge that relates to that. I said as to
9 defendant Yagy in Count 1, testimony has been
10 offered showing that he was not present in
11 the savings and loan association at the time
12 of the alleged robbery. However, the guilt
13 of a defendant may be established without
14 proof that he personally did every act con-
15 stituting the offense charged. Section 2 of
16 Title 18 of the United States Code provides:
17 "Whoever commits an offense against the United
18 States or aids, abets, counsels, commands,
19 induces or procures its commission is punishable
20 as a principal." I then told you that this
21 means that whoever directly did the act would
22 be punishable as a principal, and also whoever
23 aided, abetted, commanded, induced, and so
24 forth, could also be punishable as a principal.

25 In other words, every person who willfully

1 participates in the commission of a crime
2 may be found to be guilty of that offense.
3 Participation is willful if it is done volun-
4 tarily and intentionally, and with the specific
5 intent to do something the law forbids or with
6 the specific intent to fail to do something
7 which the law requires to be done. I know
8 I interpolated there that we were only con-
9 cerned with the doing of something and, that
10 is to say, with bad purpose, either to disobey
11 or disregard the law. Aiding and abetting is
12 different from the charge of conspiracy. As
13 I stated before, conspiracy involves the
14 planning of a criminal act. Aiding and abetting
15 involves participation in a criminal act. All
16 that is required to be proven to show that a
17 particular defendant aided and abetted is that
18 he had actual knowledge of the commission of
19 the robbery, and that he in some way willfully
20 assisted those who committed the robbery. In
21 order to aid and abet another, whether it be
22 to aid and abet Mr. Hook, Mr. Lord or Mr.
23 Schwartz, or two of those three, or all three
24 of them, to commit a crime, it is necessary
25 that the accused willfully associate himself

1 in some way with the criminal venture, and
2 willfully participate in it, as he would in
3 something he wishes to bring about, that is
4 to say, that he willfully seek by some act of
5 his to make the criminal venture succeed.
6 You, of course, may not find the defendant
7 guilty unless you find beyond a reasonable
8 doubt that every element of the offense, as
9 defined in these instructions, was committed
10 by some person or persons, and that such
11 defendant participated or assisted in its
12 commission. Finally, mere presence at the
13 scene of a crime or mere knowledge that a
14 crime is being or is to be committed is not
15 sufficient to establish that a defendant,
16 such as Mr. Yagy, aided and abetted the crime,
17 unless you find beyond a reasonable doubt that
18 he was a participant or assisted, and not
19 merely a knowing spectator.

20 FORELADY: Thank you, your Honor.

21
22 (Thereupon the court was in recess at 4:12 P.M.)

23
24 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 4:30 P.M.

Robbery case to go to jury

By SHERIDAN LYONS

Charges against three men in the \$43,365 robbery of the Columbia Banking, Savings and Loan Association, at 1415 Mt. Hope Ave., last April 9 are to go to a U.S. District Court jury for deliberation today.

The robbery was one of the largest here in the past 20 years, the FBI said.

On trial are Gerhardt J. Schwartz, 47, formerly of Brooks Avenue, James F. Lord Jr., 35, of Cornelia Drive, Gates, and Gerald J. Yagy, 41, of Britton Road, Greece.

All three were indicted on charges of conspiracy, bank robbery, and armed bank robbery. Judge John T. Elfvin yesterday dismissed the armed bank robbery charge against Yagy.

Schwartz was arrested last November in the Bronx, soon after he was placed on the FBI's Ten Most Wanted list. Special Agent Richard K. Berry, of New Rochelle, testified he and four other agents, armed with pistols and shotguns, raided the apartment and arrested Schwartz without a struggle.

Berry said an agent announced "FBI," and two agents then pushed the apartment door open, after waiting "about one second."

Schwartz directed them to a closet, where they found a briefcase containing a .38 caliber revolver, several badges, handcuffs, and a pry bar, he said.

Schwartz later told them he'd robbed the Columbia Saving Bank, dressed in green overalls, a stocking mask, and gloves, and carrying a loaded shotgun, Berry said.

Turn to Page 3B

From Page 1B

The money taken in the robbery wasn't recovered.

Elfvin told the jury the statement is to be used only against Schwartz, and denied the other defendants' motions for separate trials. None of the defendants testified.

Earlier yesterday, defense attorneys cross-examined Ronald Hook, 17, of Greece, who was named as a co-conspirator but not charged.

Hook testified Thursday that Yagy asked him to drive the car in the robbery after he and Yagy had run up gambling debts at local "social clubs."

Hook said yesterday he'd never heard of the clubs until Yagy took him there to gamble. His previous gambling experience was limited to poker games with his friends with 25 cent stakes, he said.

"The last hand of the night we used

to go all out and throw a half-dollar in the pot," Hook said.

After he began to gamble with Yagy, he said, Yagy would do the gambling, with an agreement that he and Hook would divide equally the debts or the winnings.

Hook said he borrowed money from the service station where he worked about seven or eight times, an amount totaling about \$250.

Hook said he replaced the money each time, and that he told his boss afterward what he'd done.

"The one time I couldn't repay it, I told him and said I'd bring it the next day, and I did. He understood," Hook said.

The defense later called Ross R. Columbo, former owner of the Minute Man Service Station at 1477 Dewey Ave. Columbo said he remembered Hook taking money only once.

But, Columbo said, he never knew

Hook to cheat him of any money, and never thought of firing him.

Hook said he never had debts when he later gambled by himself at the clubs, because he refused to borrow after he'd lost the \$10 he usually set as a limit. Yagy had credit, he said; but he didn't.

He said he agreed to participate in the bank robbery only to pay off the \$900 debt he and Yagy owned. Hook got \$9,700 as his share of the robbery, from which Yagy took \$4,000 for getting him the job, he said.

Hook later admitted he was hoping for more money from the robbery, and said he'd hoped to help his family, if he could do so without making them suspicious.

Hook now is in the federal Witness Protection Program, where he was placed after his recovery from an assault July 16 in which he was stabbed 47 times with an ice pick.

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22 We had testimony during the hearing that Mr.
23 Schwartz was apprehended sometime prior to
24 nine o'clock, he was arrested sometime prior
25 to nine o'clock in the morning on November 22,

1 1976, and he was taken not to New York City
2 or to a magistrate immediately, but after some
3 thirty five or forty minutes in the apartment
4 where he was arrested, he was taken in a Bureau
5 car to the New Rochelle Office of the FBI and
6 advised of his rights there, I see that was
7 properly done, and he had certain processing
8 fingerprinting and an attempted photographing,
9 and he was strip searched, then he was inter-
10 viewed, and it was not until sometime in the
11 afternoon that he was actually taken to New
12 York City, taken first to the FBI Office there
13 for photographing because the equipment in
14 the New Rochelle Office hadn't carried out
15 the job competently, and then seemingly went
16 to the office of the United States Attorney
17 in the Southern District of New York, in
18 Manhattan, and was interviewed there, and then
19 finally by a public defender, and then ulti-
20 mately he came before the magistrate and was
21 arraigned. I certainly don't want to say
22 that that delay is approved by me; in fact,
23 I think it is to some degree reprehensible,
24 but it is not reprehensible to the point
25 where the courts in our circuit, at least as

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1 as of this point, have said that if this
2 activity goes on, given the circumstances here
3 where Mr. Schwartz was in control of his
4 facilities, was not ill, was not under the
5 influence of alcohol or drugs, read the advice
6 of rights and waiver and signed the waiver,
7 having been earlier advised of the same thing,
8 I find that under those circumstances there
9 is nothing that would keep those statements
10 out of the trial record, if they are otherwise
11 admissible.

12 MR. MOREHOUSE: I respectfully except.

13 THE COURT: In that connection, I must say that I have
14 caused to be marked as Court Exhibit A the
15 proposed order to show cause that you sent
16 to Mr. Morehouse, and attached to that is
17 the affidavit made by Mr. Schwartz, verified
18 or sworn to before you on January 26, 1977,
19 and in there, of course, he is indicating
20 that certain statements were made to an agent,
21 whom Mr. Schwartz recalled to have been a
22 slender person with a slender face. He took
23 the stand and testified that it was Mr. Berry
24 who supposedly gave him this information
25 concerning Rule 20 and the need to make a

1 statement, a written statement, before that
2 could be dealt with, before he could have any
3 chance at disposing of the matter in New York
4 City. I find his testimony to be not correct,
5 to be incredible in that regard. I also find
6 it to be incredible, as far as his statement
7 that he was divulging everything, as he did
8 in Government's Exhibit 6, planning to have
9 the disposition of his case in the Southern
10 District of New York by way of a trial, at
11 which trial he would take the state and refute
12 the statements given by him. I find that to be
13 be incredible. I find that to be not

14 MR. MOREHOUSE: The defendant Schwartz respectfully excepts
15 to the ruling by the learned Court, and renews
16 the exception to the ruling of the Court per-
17 taining to the admissibility of documents in
18 violation of the Federal Rules of Practice.

19 MR. COLICCHIO: If the Court please, on behalf of the defendant
20 Yagy, regarding the statements given by the
21 defendant Schwartz, I know the Court has made
22 its ruling, but I wish to point out to the
23 Court that under Rule 9 of the Federal Rules
24 of Criminal Procedure, more particularly,
25 Rule 9(c)(1), when a defendant is arrested

1 on a warrant upon indictment, the statute
2 specifically requires, "The officer executing
3 the warrant shall bring the arrested person
4 promptly before the court or before a United
5 States magistrate."

6 THE COURT:

7 That is right, I am aware of that. As I say,
8 I do not approve of the delay that occurred
9 here and, as I say, I am not going to put my
10 seal of approval on it. I think there should
11 have been a more prompt taking of Mr. Schwartz
12 before some judicial officer for arraignment,
13 that was not done, but the judicial construction
14 of "promptly", as used in that rule, has not
15 been yet, to my knowledge, in this circuit,
16 struck down this practice that attained here.

17 MR. COLICCHIO:

18 I wish to point out, along the same argument,
19 that the rules do make a distinction between
20 a person who is arrested upon indictment and
21 a person -- as compared to a person who is
22 arrested upon a complaint, whereas in Rule
23 5(a) it says, "An officer making an arrest
24 under a warrant issued upon a complaint or
25 a person making an arrest without a warrant
shall take the arrested person without unneces-
sary delay before the nearest available

1 federal magistrate, or in the event a federal
2 magistrate is not reasonably available, before
3 a state or local judicial officer authorized
4 under 18 U.S.C., 3041."

5 THE COURT: I am aware of that.

6 MR. COLICCHIO: There is a distinct provision, arrest upon
7 indictment, it says "promptly." This would
8 have avoided the occasion even to have the
9 man waive his right to an attorney or to make
10 any statements incriminating himself or others.
11 I think --

12 THE COURT: I don't approve of this, particularly as I
13 looked at the log, Government's Exhibit 9, I
14 couldn't really understand why after all this
15 is he brought into Foley Square in New York
16 City. There was an occasion when he was taken
17 into the United States Attorney's Office and
18 there interviewed by an Assistant United States
19 Attorney, all prior to arraignment. There was
20 no offer of anything coming out of the inter-
21 view. It is something I can't understand.

22 MR. HOULIHAN: Your Honor, may I clear that up for the record?
23 For the purposes of that hearing I relied only
24 on the proposed order to show cause that Mr.
25 Morehouse submitted to the Court, and I was

1 not aware prior to the hearing that we would
2 get into the possibility of the delay. It
3 is my understanding that the interview with
4 the Assistant United States Attorney is a --
5 follows a particular format, asking the
6 defendant if he understands his rights and
7 asking him if he wants an attorney. Immediately
8 when he says he wants an attorney --

9 THE COURT: It is more the job of a magistrate or judge,
10 isn't it?

11 MR. HOULIHAN: I would presume that the magistrate would have
12 that primary responsibility. I'm not aware of
13 it, other than that information that I received,
14 and that seems to be the practice down in the
15 Southern District. Is that correct?

16 THE COURT: We are jousting with something I am not going
17 to deal with. I merely mentioned that I
18 couldn't understand why. I do not basically
19 approve of the practice. I am ruling that
20 Government's Exhibit 6, the written statements
21 made by Mr. Schwartz, are per se admissible,
22 depending upon the circumstances of proof
23 in probity and prejudice during trial. The
24 same thing concerning direct evidence of the
25 supposed oral statements.

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CERTIFICATE OF SERVICE

June 30, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the ~~Western~~ District of New York ~~and to co-counsel.~~

Barry Bassis

